

But, assuming that this is a new ground (which it is not), it is one which presents no federal question. Nor does Anderson suggest any reason why the ends of justice would be served by a re-examination of the old grounds.

[11, 12] But, even had the trial court overlooked the fact that all points raised had been previously litigated in federal court proceedings, it would have been required to deny the relief requested. This is true because no one of the grounds stated in Anderson's application for a writ of habeas corpus presented anything approaching a federal question.⁹ A state prisoner is not entitled to a writ of habeas corpus from a federal court unless he is in custody in violation of the Constitution or laws or treaties of the United States. *Sampsell v. People of State of Cal.*, 9 Cir., 191 F.2d 721.

[13] We are therefore of the view that the papers before us reveal no reasonable probability that an issue which is not plainly frivolous may be presented on this appeal. Accordingly we hold,

9. Briefly stated, the grounds asserted in the application for a writ of habeas corpus are as follows:

(1) Anderson was not brought to trial within sixty days after the filing of the information, contrary to Cal.Pen.Code, §§ 1381, 1382. (This question was disposed of in *People v. Anderson*, 126 Cal.App. 2d 702, 272 P.2d 805, it being pointed out that the delay was due to the fact that Anderson, after apprehension, became a fugitive from justice);

(2) Anderson was not taken before a magistrate "without unnecessary delay, and, in any event, within two days after his arrest," as required by Cal.Pen.Code, § 825, but was held from March 23, 1953, until July 13, 1953, before being transported to Los Angeles, "without a presentation before a magistrate." (The state court decision referred to above recites that the information was filed on September 13, 1951, and that he was arraigned on September 17, 1951);

(3) The evidence was insufficient to sustain the conviction because no criminal intent was shown. (This question was dealt with in the decision of the California District Court of Appeal, *supra*, it being held that "the evidence fully sup-

ports the finding that defendant was guilty of grand theft");

in conformity with the principle announced earlier in this opinion, that the due process clause of the Fifth Amendment does not entitle this appellant to the appointment of counsel as a matter of right.

The same considerations are sufficient to indicate that we should not grant such request as a matter of discretionary relief. But there are also other considerations leading to the same conclusion, which ought to be mentioned.

[14] This particular habeas corpus proceeding involves not a federal, but a state prisoner. He has already had a complete state court adjudication of every issue which he seeks to raise.¹⁰ Except under most unusual circumstances, an attorney ought not to be appointed by a federal court for the purpose of trying to find something wrong with a state judgment of conviction.¹¹

The request for appointment of counsel to assist Anderson in obtaining leave to proceed in forma pauperis on this appeal is accordingly denied.

ports the finding that defendant was guilty of grand theft");

(4) It was error to permit use, at the trial, of a transcript of the preliminary hearing. (Rejecting the same contention, the California District Court of Appeal said: "Defendant has no cause for complaint because his counsel, in his presence, submitted the cause on the transcript of the preliminary examination reserving the right to present further evidence.")

Briefs filed by appellant in this court advance two or three additional grounds which were not mentioned in his application for a writ of habeas corpus. None of them, however, involves a federal question.

10. Were this not true, he would not have exhausted his state remedies, and would, for that reason, have no standing in federal court.

11. In the rare case where state appellate review on the merits has been denied because of a jurisdictional defect for which the appellant ought not to be blamed, a different conclusion may be indicated.

[15] The factors outlined above indicate that the certificate of the district court that the appeal is not taken in good faith should not be displaced, and we decline to do so. The motion to proceed in forma pauperis is therefore denied.

The district court, in an order dated May 6, 1958, denied Anderson's request for a certificate of probable cause. For the same reasons which actuate our disposition of the other motions referred to above, each of the undersigned judges, acting individually, declines to issue a certificate of probable cause.

The application for a certificate of probable cause, motion for leave to proceed in forma pauperis, and request for appointment of counsel are denied. The appeal is dismissed.



UNITED STATES of America,
Appellee,

v.

Rudolph Ivanovich ABEL, also known as
"Mark" and also known as Martin Col-
lins and Emil R. Goldfus, Appellant.

No. 331, Docket 24968.

United States Court of Appeals
Second Circuit.

Argued April 16, 1958.

Decided July 11, 1958.

Certiorari Granted Oct. 13, 1958.

See 79 S.Ct. 59.

Prosecution for conspiring to violate espionage laws by communicating information concerning National Defense of United States to the Soviet Union, receiving and obtaining material connected with National Defense for purpose of transmitting such material to Soviet government and by acting as agent of foreign government without prior notification thereof having been given to

Secretary of State. The United States District Court for the Eastern District of New York, Mortimer W. Byers, Chief Judge, denied defendant's pretrial motions to suppress certain evidence, 155 F.Supp. 8, and to strike alleged surplusage from indictment and entered judgment on verdict of guilty and the defendant appealed. The Court of Appeals, Waterman, Circuit Judge, held that agents of immigration and naturalization service, while making a valid arrest pursuant to a deportation arrest warrant, could, as an incident of arrest, conduct a search of hotel room in which arrest was made without possessing a search warrant.

Affirmed.

1. Conspiracy ⇐23

In a prosecution for a conspiracy, failure or success of conspiracy is of no relevance and failure to produce evidence of success is not fatal.

2. Searches and Seizures ⇐7(1)

Only unreasonable searches and seizures are prohibited by the Fourth Amendment, and determination of whether a search or seizure is unreasonable depends upon particular facts and circumstances of each case. U.S. C.A.Const. Amend. 4.

3. Arrest ⇐71

Agents of Immigration and Naturalization Service, while making a valid arrest pursuant to a deportation arrest warrant, could, as an incident of arrest, conduct a search of hotel room in which arrest was made without possessing a search warrant. U.S.C.A.Const. Amend. 4.

4. Arrest ⇐71

Government agents may, as incident to a lawful arrest, conduct a search of premises where arrest is made. U.S. C.A.Const. Amend. 4.

5. Arrest ⇐71

A search conducted pursuant to an arrest made without a warrant is not dependent upon the urgency of the situation. U.S.C.A.Const. Amend. 4.

6. Criminal Law ⇨260(11)

Findings of trial court may not be set aside unless clearly erroneous.

7. Criminal Law ⇨394

Searches and Seizures ⇨7(12)

In prosecution for conspiring to violate espionage laws by foreign espionage agent who was arrested by immigration agents on information furnished by agents of Federal Bureau of Investigation, who received permission to question foreign agent prior to his arrest by immigration agents, evidence sustained finding that search conducted by immigration agents following arrest was not unreasonable and did not violate Fourth Amendment and that arresting officers in good faith searched hotel room in which foreign agent was arrested for purpose of finding weapons or evidence of alienage and not to uncover evidence of espionage. 18 U.S.C.A. §§ 793(c), 794(a), 951; Fed.Rules Crim.Proc. rule 41(e), 18 U.S.C.A.; U.S.C.A.Const. Amend. 4; Immigration and Nationality Act, §§ 103(a), 241, 242(a), 265, 266, 8 U.S.C.A. §§ 1103(a), 1251, 1252(a), 1305, 1306.

8. Criminal Law ⇨419(12)

In prosecution for conspiring to violate espionage laws by foreign espionage agent who was arrested by immigration agents, newspaper article purportedly setting forth statements made by Commissioner of Immigration and Naturalization was hearsay. 18 U.S.C.A. §§ 793(c), 794(a), 951; Fed.Rules Crim.Proc. rule 41(e), 18 U.S.C.A.

9. Searches and Seizures ⇨7(12)

Where foreign espionage agent was arrested by immigration agents pursuant to a deportation arrest warrant, seizure by immigration agents of several slips of paper which foreign agent was trying to secrete in his sleeve and which were instrumentalities and means by which he might have committed crime of espionage was reasonable even though unrelated to the purpose for which warrant was issued. 18 U.S.C.A. §§ 793(c), 794

(a), 951; Fed.Rules Crim.Proc. rule 41(e), 18 U.S.C.A.; U.S.C.A.Const. Amend. 4.

10. Conspiracy ⇨47

Evidence was sufficient to sustain conviction for conspiring to violate espionage laws. 18 U.S.C.A. §§ 793(c), 794(a), 951; Fed.Rules Crim.Proc. rule 41(e), 18 U.S.C.A.

11. Conspiracy ⇨23

Conspirators' lack of success does not lessen the criminality of their activities.

12. Witnesses ⇨318

In prosecution of foreign espionage agent for conspiring to violate espionage laws, wherein another foreign espionage agent testified that he and defendant attempted to contact an Army master sergeant who had served for a time as motor sergeant at American Embassy in Moscow, testimony by Army sergeant as to contacts with various Russian civilians and members of military service and instructions he received from Soviet agents upon return to United States and his movements thereafter was properly admitted to corroborate testimony of such other agent. 18 U.S.C.A. §§ 793(c), 794(a), 951; Fed.Rules Crim.Proc. rule 41(e), 18 U.S.C.A.

13. Criminal Law ⇨1167(3)

Indictment and Information ⇨119

In prosecution for conspiring to violate espionage laws under indictment charging that it was part of conspiracy to engage in acts of sabotage, such allegation as to sabotage was surplusage, but failure to strike such surplusage was insubstantial error when there was no testimony concerning sabotage or a conspiracy to commit sabotage and jury was instructed that indictment was not evidence and was not to be considered as evidence. 18 U.S.C.A. §§ 793(c), 794(a), 951; Fed.Rules Crim.Proc. rule 41(e), 18 U.S.C.A.

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Before CLARK, Chief Judge, and LUMBARD and WATERMAN, Circuit Judges.

WATERMAN, Circuit Judge.

On August 7, 1957 a grand jury in the Eastern District of New York returned an indictment charging the appellant, Rudolph Ivanovich Abel, with having conspired to violate the espionage laws of the United States. Specifically, the indictment charged Abel with having conspired (1) to violate 18 U.S.C. § 794 (a) by communicating information concerning the national defense of the United States to the Union of Soviet Socialist Republics; (2) to receive and obtain material connected with the national defense of the United States for the purpose of transmitting such material to the Soviet government in violation of 18 U.S.C. § 793(c); and (3) to violate 18 U.S.C. § 951 by acting in the United States as an agent of a foreign government without prior notification thereof having been given to the Secretary of State. Prior to his trial upon this indictment, Abel moved pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, 18 U.S.C. for the return and suppression of certain evidence obtained by the Government as a result of an alleged unlawful search and seizure. The motion was heard by Judge Byers who, after a hearing, denied it in an opinion reported at 155 F.Supp. 8. The appellant was tried to a jury and convicted on each of the counts in the indictment. On November 15, 1957 he was sentenced to a total of thirty years imprisonment.

The primary issue raised by this appeal is whether the Fourth Amendment prohibition of "unreasonable searches and seizures" was violated when govern-

ment agents without a search warrant searched a hotel room occupied by Abel and seized certain articles which they found there. Also, we are called upon to determine whether there was sufficient evidence in the record to sustain a finding that Abel conspired to communicate to the Soviet Government information the transmission of which is prohibited by the espionage laws, see *United States v. Rosenberg*, 2 Cir., 1952, 195 F.2d 583, certiorari denied 344 U.S. 838, 73 S.Ct. 20, 97 L.Ed. 687; *United States v. Heine*, 2 Cir., 1945, 151 F.2d 813, certiorari denied 328 U.S. 833, 66 S.Ct. 975, 90 L.Ed. 1608, and to determine whether the trial judge erred by receiving in evidence the testimony of a non-commissioned Army officer that he cooperated with the Soviet Government while serving in the American embassy in Moscow. And lastly, counsel for the appellant urge that a new trial is required because the cumulative effect of a variety of minor errors alleged to have occurred during the trial was such that the appellant did not have a fair trial.

In early May 1957 one Reino Hayhanen entered the American embassy in Paris and informed the officials there that he was an espionage agent in the United States for the Soviet government. Hayhanen was interrogated by the officials and later was flown back to the United States where he was questioned by agents of the Federal Bureau of Investigation. It was largely from the testimony of Hayhanen, though there was evidence from other sources as well, that the jury learned of the appellant's activities in the United States. Although there is no dispute about the sufficiency of the evidence to prove concerted activity between Abel and others on behalf of the Soviet government, a brief résumé of the record developed at the trial will be useful to indicate the scope of the conspiracy which was proved and the means by which its purposes were to be accomplished.

Abel is a native of Russia, a citizen of the U. S. S. R., and a Colonel in the K. G. B., an espionage agency of the Soviet

government. By his own admission he entered this country illegally in 1948 at an unknown point along the Canadian border. After this illegal entry the appellant, whose cryptonym is "Mark," adopted several aliases, one of which was Emil Robert Goldfus, the name of an infant who had died in New York City in 1903; while another was Martin Collins, a fictitious individual purportedly born in New York City. At the time of his arrest, on June 21, 1957, Abel was residing at the Hotel Latham in Manhattan and had rented an artist's studio in Brooklyn.

Hayhanen was also an agent of the K. G. B. and at the time of Abel's arrest held the rank of Lieutenant Colonel, though at the time he entered this country several years earlier he had been a Major. Hayhanen entered this country in 1952 with the passport and identity of one Eugene N. Maki, a native of the United States who had left this country for Russia in 1927.¹ Upon his arrival in New York City Hayhanen, according to his instructions, placed a tack in a designated sign in Central Park. This prearranged signal was the means by which he was to notify Soviet agents in New York that he had arrived safely and was not under surveillance.

Prior to the time that he had left the U. S. S. R. Hayhanen had received extensive training in the techniques of

espionage. Thus, he was given instruction in photography with emphasis on making "microdots"² and "soft film."³ He was also taught how to secrete messages in hollowed out objects such as coins, bolts, screws and match books. In addition, he was given training in cryptography and assigned the cryptonym "Vik" which he was to use when communicating with other espionage agents. Hayhanen was also advised of the location of three "drops" in New York City. A "drop" is a hiding place used for the transmission of messages concealed in containers. Hayhanen was instructed to use these "drops," which were located in a wall on Jerome Avenue in the Bronx, a bridge in Central Park, and a lamp post in Fort Tryon Park,⁴ in communicating with his superiors.

Hayhanen had been sent to this country to serve as an assistant to an individual whom he then knew only as "Mark." Nevertheless, he did not meet Abel until the summer of 1954 when the two of them met in the men's smoking room at a theatre in Flushing. As far as appears, the only significance of this meeting was that Abel expressed some concern that Hayhanen obtain "cover work" which would not interfere with his espionage duties.⁵ Thereafter, Hayhanen saw Abel frequently, received his salary from him, and carried out several missions at his direction. On

remove its backing. The significance of "soft film" for espionage purposes is that it is pliable and capable of being folded to a small size.

1. Hayhanen's testimony revealed the elaborate detail with which this illegal entry into the country had been planned. In 1949 he was smuggled into Finland by Soviet officials and remained there until 1952 when he embarked for the United States. During this time he assumed the identity of Maki and received funds with which to pay individuals in Finland so that they would be willing to state that he had lived in that country since 1943.
2. "Microdot" is the term ordinarily used for a photographic reduction of a document which is capable of being enlarged so as to be readable. Hayhanen also received instructions on this subject from Abel after he had met the latter in this country.
3. "Soft film" is made from ordinary film by chemically treating the latter so as to

4. The location of the "drops" was changed from time to time, but each was regularly assigned a number. Whenever Hayhanen had a communication for his superiors which he had concealed in a "drop," he would make a horizontal line in colored chalk on a slat in a designated fence in Central Park, the number of the slat, counting from the street side, corresponding to the number of the "drop" at which the message had been left.

5. "Cover work," as Hayhanen testified, is a means of visible support, necessary to avoid arousing suspicion concerning the activities of an agent.

several occasions he saw Abel make use of "drops" which had been assigned to him and once was told by the appellant that the latter had several agents under him. Abel admitted to Hayhanen that he had received coded messages and on one occasion Hayhanen observed Abel attempting to receive the signals of a short-wave radio station. This attempt was unsuccessful. Also unsuccessful were attempts by Abel to find a suitable location for the establishment of a radio station which he had received instructions from Moscow to establish.

[1] The record contains no indication that Abel or any of his colleagues were ever successful in transmitting to the Soviet Government any information pertaining to the national defense, but as the legality of a conspiracy is not to be judged by its success, the failure to show success is of no relevance. United States v. Rabinowich, 1915, 238 U.S. 78, 35 S.Ct. 682, 59 L.Ed. 1211; United States v. Morello, 2 Cir., 1957, 250 F.2d 631. Considerable evidence is contained in the record establishing a continuous activity by the appellant on behalf of the Soviet government. This evidence need not be considered in detail; it will be sufficient to describe a particular episode which is relevant to issues raised by Abel on this appeal.

Sometime between July and December 1954 Abel received instructions from Moscow to locate a Soviet agent named Roy Rhodes, whose cryptonym was "Quebec." The instructions stated that Rhodes' wife owned several garages in Red Bank, New Jersey, but when, in late 1954, Abel and Hayhanen went to Red Bank they were unable to locate Rhodes. Abel instructed Hayhanen that in the latter's next message to Moscow he should request additional information about Rhodes. Hayhanen received a reply stating that Rhodes' family lived in Colorado and by some means not apparent from the record he and Abel were able to determine that the family lived in the town of Salida. Abel instructed Hayhanen to take a

trip to Salida. Prior to the time that Hayhanen left, he and Abel went to the Central Library in Manhattan and obtained the name and telephone number of Rhodes' father. Hayhanen called this number when he arrived in Salida, stated that his name was Mike and that he would like to contact Rhodes. The party on the other end of the line, subsequently identified as Arlene Brown, a sister of Rhodes, informed Hayhanen that Rhodes was living in Tucson, Arizona. Hayhanen returned to New York and reported to Abel. Though there was some discussion as to whether Hayhanen should go to Tucson, Abel finally decided against it.

A discussion of Rhodes' role in the Soviet espionage system may be deferred until that portion of the opinion which deals with the admissibility of his testimony at the trial below. It is sufficient at this point to note the reason why Abel and his colleagues were so anxious to locate Rhodes. In the words of the witness Hayhanen:

"He [Abel] said that Quebec could be a good agent because he is—some of his relatives are working on—and he—on military lands.

"He meant Quebec's brother, who was working somewhere—I cannot remember exactly, but in some atomic plant, or what it was."

In the summer of 1955 the appellant took a trip to the U. S. S. R. He and Hayhanen did not meet again until the following summer. At that meeting and during the next few months, arrangements were made for Hayhanen to travel to Russia on leave. Hayhanen left New York aboard the Liberté on April 24, 1957. Shortly after arriving in Paris, he notified other Soviet agents, by prearranged signal, that he had arrived safely and that he was proceeding to West Berlin. Instead of proceeding with this plan, he went to the American embassy where he informed the officials of his activities.

As a result of these disclosures agents of the F. B. I. began an intensive in-

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vestigation of the appellant—an investigation which led to his arrest on June 21, 1957 by agents of the Immigration and Naturalization Service.

I. Search and Seizure

The search and seizure issue raised by the appellant involves three separate and distinct questions: (1) whether agents of the Immigration and Naturalization Service, when making a valid arrest pursuant to a deportation arrest warrant,⁶ may, as an incident of the arrest, conduct a search of the hotel room in which the arrest is made without possessing a search warrant; (2) whether it was "clearly erroneous" for the distinguished trial judge to have found that the search conducted by the I. N. S. agents in the present case was conducted in good faith solely for the purpose of discovering weapons and evidence of alienage; or whether, contrary to that finding, the agents' true purpose in searching Abel's hotel room was to discover evidence of his espionage activities; (3) whether, assuming that the search was conducted in good faith, the articles seized by the I. N. S. agents might lawfully be seized in the absence of a search warrant.

[2] Proper understanding of the several facets of the search and seizure issue raised by the appellant necessitates that we state in some detail the circumstances surrounding his arrest and the search of his hotel room. For, as the Supreme Court has frequently observed, only "unreasonable searches and seizures" are prohibited by the Fourth Amendment, and the determination of whether a search or seizure is unreasonable depends upon the particular facts and circumstances of each case. See *United States v. Rabinowitz*, 1950, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653; *Harris v. United States*, 1947, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399.

6. 8 U.S.C.A. § 1252(a) provides that "Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody."

hanen's disclosures in early May of 1957, agents of the F. B. I. placed Abel under surveillance. On several occasions he was observed at 252 Fulton Street in Brooklyn, the address of the studio which he had rented. Also, on a date which does not appear in the record, F. B. I. agents rented the room in the Hotel Latham immediately adjacent to that occupied by Abel under the name of Martin Collins. Meanwhile, Hayhanen, who had been flown from Paris to New York, continued his cooperation with United States officials and directed F. B. I. agents to various espionage materials which he accused Abel of having given to him.

On June 13 agents of the I. N. S. were for the first time informed that the F. B. I. had information concerning an alien illegally in this country. This information was conveyed by one Sam Papich, the F. B. I. liaison officer with the I. N. S., to Mario T. Noto, Deputy Assistant Commissioner for Special Investigations of the I. N. S. Noto was also informed that there was evidence that the suspect, Abel, had engaged in espionage. At Noto's request Papich stated that he would attempt to obtain additional information relating to Abel's illegal entry and his status in the United States. Noto testified at the hearing on the motion to suppress that he had not asked Papich for any information concerning Abel's espionage activities "because my interest from a jurisdictional viewpoint is confined to the illegal status which he had in the United States." Noto further testified that Papich had not requested I. N. S. to treat the case in any particular manner and that, aside from this request by him for further information, no arrangements for cooperation were made between the two agencies. Approx-

Pursuant to the authorization of delegation contained in 8 U.S.C.A. § 1103(a), regulations have been promulgated authorizing the issuance of warrants by district directors of the Service. 8 C.F.R. 242.2(a).

mately a week later Papich returned and gave Noto the additional information which the latter had requested, including the fact that the suspect's true name was Rudolph Abel, that he had entered the country by way of Canada, that in so doing he had used a birth certificate which was not his own, and that he had stated to several persons that he was in this country illegally. Noto was also informed that Abel was an officer in the Soviet espionage system. Prior to this time, Noto had conducted a search of I. N. S. records to determine whether I. N. S. had any information concerning the suspect.

After obtaining this additional information from Papich, and after acquainting General Swing, the Commissioner of the I. N. S., with the details of the case, Noto again met with F. B. I. agents. At one point during this meeting he informed the agents that he "would determine very shortly as to whether or not I would order that Mr. Abel be apprehended for immigration purposes * * *". Later, he informed the agents that he would "very quickly" order the arrest of Abel for "having failed to notify the Attorney General of his address in the United States as required by the Immigration and Nationality Act which makes it a deportable offense." On June 20 Noto met with two other I. N. S. officers and informed them for the first time of the Abel case. These three men then went to the offices of the F. B. I. where the evidence against Abel was again reviewed. The I. N. S. officials agreed that the evidence was sufficient to justify issuance of a "show cause" order as to Abel's deportability and that an administrative arrest warrant should be drawn. The decision to use an administrative warrant was, in effect, a decision that Abel should be held for a deportation hearing and not apprehended as one charged with a criminal offense; but at the hearing on the motion to sup-

7. The failure of an alien to notify the Attorney General of his address as required by 8 U.S.C.A. § 1305 is a criminal of-

press Noto testified that in his expert opinion the election to commence deportation proceedings would not preclude a subsequent criminal prosecution. Noto testified that he alone made the decision as to the type of proceeding which was to be initiated.

The "show cause" order and arrest warrant were drawn in Washington and Noto instructed two I. N. S. agents to take them to New York to be signed by John Murff, Acting District Director of the I. N. S. there, after which they were to supervise the arrest of Abel. The agents were also instructed to communicate with the F. B. I. office in New York. Noto testified that this latter instruction was given on his own initiative and that it had not been requested by agents of the F. B. I. The I. N. S. agents went to New York where they carried out the instructions which Noto gave them. After Murff had signed the "show cause" order and arrest warrant, the I. N. S. agents communicated with the agents of the F. B. I. who requested an opportunity to talk with Abel prior to his arrest. The purpose of this request, which was granted by the I. N. S. officials, was to determine whether Abel would agree to "cooperate." Agent Farley, one of the I. N. S. agents who made the arrest, testified that his instructions were to make it; and that, contrary to appellant's contention, he received no instructions that the arrest was to be contingent upon whether or not appellant agreed to cooperate with the F. B. I. agents.

At approximately 7:00 A.M. on June 21, while I. N. S. agents waited in an adjoining room, agents of the F. B. I. knocked on the door of Abel's hotel room and gained admittance to it. They showed Abel their credentials and informed him that they were charged with the duty of investigating matters pertaining to the internal security of the United States. Abel, whom the agents

fense under 8 U.S.C.A. § 1306 and constitutes grounds for deportation under 8 U.S.C.A. § 1251.

addressed as "Colonel," was asked a number of questions, some of which he answered. He declined to reply to others. He was told that the agents had information that he had engaged in espionage and that his "cooperation" was solicited. He was also told that if he did not "cooperate," he would be arrested before he left the room. After nearly a half hour of questioning, the F. B. I. agents decided to have the I. N. S. agents arrest the appellant, and one of them left the room to so notify them. Thereupon, the I. N. S. agents entered the room and arrested Abel. They then searched the room for the purpose, according to their testimony, of finding either weapons or evidence of alienage. It is undisputed that the F. B. I. agents, though present when the search was made, did not participate in it. The only articles seized during this search were: (1) a birth certificate in the name of "Martin Collins"; (2) a birth certificate in the name of "Emil Goldfus"; (3) an international certificate of vaccination issued in the name of "Martin Collins"; and (4) a bank book issued by the East River Savings Bank in the name of "E. R. Goldfus."

While they were in Abel's room the I. N. S. agents also seized three slips of paper, only one of which was offered and admitted into evidence. These slips were seized under the following circumstances: The agents told Abel that he could pack and take with him anything that he desired. When he had finished packing he asked for and received permission to repack one of his bags. While he was repacking the bag, one of the I. N. S. agents noticed that he was trying to secrete some papers in his sleeve. These papers then were seized by the agent. The one that was introduced into evidence was a strip of graph paper containing a coded message in grouped digits.

Abel gave agent Farley a sufficient amount of money to pay the rent for his room until 3:00 P.M. of that day, and this money was paid to the hotel by another agent who promptly checked Abel

out. At approximately 8:30 A.M. the I. N. S. agents left the hotel with Abel and drove to the district office of the I. N. S. As soon as they had left, F. B. I. agents inquired of the hotel manager whether Abel had "checked out" and, upon receiving an affirmative answer, they requested and received from the hotel manager a written consent to search the room which Abel had occupied. When these agents searched the room they seized the entire contents of a wastebasket which partially consisted of articles which Abel had discarded while packing. Only two articles seized during this search were offered and admitted into evidence: a piece of wood wrapped in sandpaper and containing a cipher pad, and a hollowed-out wooden pencil containing microfilm.

On these facts Judge Byers, who heard the motion to suppress, rejected the appellant's contention that federal agents had violated the Fourth Amendment. He held that I. N. S. agents making an arrest pursuant to an administrative warrant may, as an incident of that arrest, conduct a search of the hotel room in which the arrest is made, and he found that the search of Abel's room was made in good faith for the purpose of discovering weapons and evidence of alienage and not for the purpose of uncovering evidence of Abel's espionage activities. For the reasons hereinafter stated we agree with this conclusion of law and decline to reverse this finding of fact.

A. *Lawfulness of Search Incident to Arrest upon Deportation Charges.*

[4] With the single exception of *Trupiano v. United States*, 1948, 334 U.S. 699, 68 S.Ct. 1229, 92 L.Ed. 1663, overruled in *United States v. Rabinowitz*, supra, the Supreme Court has consistently held that government agents may, as incident to a lawful arrest, conduct a search of the premises where the arrest is made. *Harris v. United States*, supra; *Agnello v. United States*, 1925, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145. Counsel for the appellant point out that in every case in which such a search

has been upheld the arrest was made for the commission of a crime. Relying upon *Harisiades v. Shaughnessy*, 1952, 342 U.S. 580, 72 S.Ct. 512, 96 L.Ed. 586, in which deportation proceedings were characterized as civil rather than as criminal proceedings, counsel urge that the issuance of the administrative arrest warrant and the apprehension of appellant pursuant to it did not confer upon the arresting officers the right to search the hotel room in which the arrest was made. Some support for this position may be found in *Robinson v. Richardson*, 1859, 13 Gray, Mass., 454 in which the Supreme Judicial Court of Massachusetts held a Massachusetts statute invalid as authorizing "unreasonable searches and seizures" because it provided for the issuance of warrants to search for the property and books of account of insolvent debtors. During the course of its opinion, later cited with approval in *Boyd v. United States*, 1886, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, the court pointed out that "Search warrants were never recognized by the common law as processes which might be availed of by individuals in the course of civil proceedings, or for the maintenance of any mere private right; but their use was confined to cases of public prosecutions, instituted and pursued for the suppression of crime or the detection and punishment of criminals." 13 Gray at page 456. Nevertheless, although the Massachusetts court mentioned the civil nature of the proceedings, later portions of its opinion indicate that the main objection it found to the use of a search warrant the statute authorized was that it "is to be used exclusively * * * as a

8. As far as we have been able to determine, the Third Circuit appears to be the only appellate court to have considered the power of I. N. S. agents to conduct a search as incident to a lawful arrest in connection with deportation proceedings. See *Diogo v. Holland*, 3 Cir., 1957, 243 F.2d 571; *Da Cruz v. Holland*, 3 Cir., 1957, 241 F.2d 118. Both of those cases were decided *per curiam*, and neither contained a discussion of the problem, but in each case the court appar-

ing but a personal claim or the right to prosecute a private suit is involved." 13 Gray at page 457 (emphasis supplied).

By contrast, deportation, like punishment for crime, as Judge Byers stated below, "is initiated in the interests of the United States and for the protection of its citizens. * * *" 155 F. Supp. at page 10. The similarity between criminal actions and deportations is attested to by the fact that the identical charges upon which Abel was arrested may be made the subject either of a criminal prosecution, 8 U.S.C.A. §§ 1306, 1325, or a deportation hearing, 8 U.S.C.A. §§ 1251(a) (1), 1251(a) (5). Moreover, the procedure applicable to deportation proceedings, though in some respects different than that applicable to criminal proceedings, see *Carlson v. Landon*, 1952, 342 U.S. 524, 537, 72 S.Ct. 525, 96 L.Ed. 547, is in many ways similar. Arrest and detention are provided for by statute, see 8 U.S.C.A. § 1252(a), and indeed have been recognized by the Supreme Court as a necessary part of the deportation procedure. *Carlson v. Landon*, supra, 342 U.S. at page 538, 72 S.Ct. at page 533.

With these similarities in mind, there would appear to be no basis for distinguishing between the right of government agents to conduct a search incident to a lawful arrest for commission of a crime and their right to conduct a search incident to a lawful arrest in connection with deportation proceedings. The grounds of public policy and convenience which justify the former are no less strong in the case of the latter.⁸

ently assumed that searches made by I. N. S. officers incident to lawful arrest are not unlawful *per se*. In *Taylor v. Fine*, D.C.S.D.Cal.1953, 115 F.Supp. 68, 70, Chief Judge Yankwich stated by way of dictum that "Incidental to a legal arrest whether with or without a warrant, the officers [I. N. S. agents] may conduct a reasonable incidental search," but each of the cases which he cited in support of this proposition involved a criminal prosecution.

pellant point out, the warrant upon which Abel was arrested was an administrative warrant and hence was not issued under the safeguards associated with judicially issued warrants of arrest. Nevertheless, the search by the I. N. S. agents was not rendered unlawful on that account. Searches conducted as incident to a lawful arrest have frequently been upheld by the courts even though the arrest was made without issuance of any process. See e.g., *Agnello v. United States*, supra, 269 U.S. at page 30, 46 S.Ct. at page 5; *Marron v. United States*, 275 U.S. 192, 198-199, 48 S.Ct. 74, 72 L.Ed. 231. And, in this Court at least, it has long been settled that a search conducted pursuant to an arrest made without a warrant is not dependent upon the urgency of the situation. In *United States v. Lindenfeld*, 2 Cir., 1944, 142 F.2d 829, we sustained the validity of a search without a warrant as incident to an arrest without a warrant where the lawfulness of the arrest was due to the fact that a felony had been committed (though not in the presence of the arresting officers) and the arresting officers had probable cause for believing that the person arrested had committed it. Cf. *United States v. Jones*, 7 Cir., 1953, 204 F.2d 745. In view of these decisions, we hold that the search by the I. N. S. agents was lawful even though the arrest was not authorized by a judicially issued warrant for the arrest of appellant.

B. Lawfulness of Search—"Good Faith" of Arresting Officers.

[6,7] The appellant next contends that the search conducted by the I. N. S. agents was unreasonable and violated the Fourth Amendment because the true objective of the arresting officers who conducted the search was to uncover evidence of espionage rather than to discover weapons or evidence of alienage. Cf. *Harris v. United States*, supra. This contention, vigorously denied by the Government, was rejected by Judge Byers who, at a pre-trial hearing upon appellant's motion to suppress the

articles seized, found that the arresting officers in good faith searched Abel's hotel room for the purpose of finding weapons or evidence of alienage. This finding may not be set aside unless, from a survey of the record, we are convinced that it was clearly erroneous. *Davis v. United States*, 1946, 328 U.S. 582, 66 S.Ct. 1256, 90 L.Ed. 1453. Examination of the record developed at the pre-trial hearing on appellant's motion to suppress demonstrates that there is an adequate foundation to support Judge Byers' finding. To be sure, the I. N. S. first learned of Abel's illegal presence in this country from the F. B. I., but that does not indicate that the I. N. S. search was not made in good faith. Nor does the fact that F. B. I. agents received permission to question Abel prior to his arrest by I. N. S. agents indicate that the I. N. S. agents did not act in good faith. In effect, appellant's attack on the trial judge's finding amounts to an argument that it is absurd to believe that two law enforcement agencies of the Government, both integral parts of the Justice Department, would limit themselves to searching for evidence of alienage when they had more than ample reason to suspect that the inhabitant of the room which they were searching was a high-ranking espionage agent in the employ of a foreign government. We do not deny that such an inference might be drawn from the evidence, but the reasonableness of such an inference is not presently before us. The only question before us is whether the evidence in the record supports the finding of good faith made by the court below. The answer to that question must clearly be in the affirmative.

Noto testified that the interest his Service had in the appellant was confined to the latter's illegal presence in the United States. He further testified the only role played by F. B. I. agents in connection with the arrest was that they provided the I. N. S. with information concerning Abel's illegal status; and that he alone, with no request from

the F. B. I., decided to arrest Abel and to institute deportation proceedings rather than a criminal prosecution. One of the I. N. S. agents who made the arrest testified that he had not received instructions to effect the arrest only if Abel refused to "cooperate" with the F. B. I. and that he had not been instructed to search for evidence of espionage. Both this agent and another I. N. S. officer testified that they were searching for evidence of alienage. Surely we cannot hold that the trial judge was bound to reject this direct evidence of good faith and instead base his finding upon the unsupported and contradicted inference which the appellant urges.

[8] The appellant, by affidavit, sought to sustain his version of the purpose of the search by presenting to the court an article printed in the New York Herald Tribune, under date of August 12, 1957, purportedly setting forth certain statements made by Lieutenant General Joseph M. Swing, Commissioner of the I. N. S.⁹

The article reported that General Swing had stated that the arrest of

Abel "was made at the specific request of 'several government agencies' * * *" and "that Abel would not have been arrested by immigration officials on June 21 if American counter-intelligence had not requested it." At the very most, the content of this newspaper article if worthy of any court consideration at all only created a conflict in the record which the trial judge was empowered to resolve. Beyond this, however, we see no reason why the trial judge should have credited this multiple hearsay. Not only was the newspaper report itself hearsay, but, on the testimony of Noto, it is clear that General Swing had no first-hand knowledge of the extent of cooperation between the I. N. S. agents and those of the F. B. I.¹⁰

Moreover, the direct testimony by I. N. S. agents as to the purpose for their search is corroborated by evidence in the record as to the articles seized by them during their search. As we have previously noted, the only articles seized by the I. N. S. agents during their search of the hotel room were (1) the Martin Collins birth certificate, (2) the Emil Goldfus birth certificate, (3) the in-

9. The pertinent portions of the article are as follows:

"Spy Hunters Had Eye on Abel a Year

"Arrest Made at Their Request

"By Richard C. Wald

"The immigration authorities' arrest of alleged master spy Rudolph Ivanovich Abel was made at the specific request of 'several government agencies,' it was revealed yesterday by Lt. Gen. Joseph M. Swing, Commissioner of Immigration.

"We were well aware of what he was when we picked him up," Gen. Swing said. "Our idea at the time was to hold him as long as we could."

"Gen. Swing indicated that Abel would not have been arrested by Immigration officials on June 21 if American counter-intelligence had not requested it. The commissioner said he could not comment, however, on which agencies provided the information or asked for the arrest. In all cases, it is standard Immigration Service procedure to notify all government intelligence agencies of a pending arrest before it is made, he said. * *"

10. It should be noted that even if the newspaper report of the interview with General Swing were to be credited, then there would only be evidence that the arrest was made at the request of counter-intelligence. This would not be inconsistent with the direct evidence that the search incident to the arrest was conducted solely for the purpose of discovering evidence related to the offense charged in the administrative arrest warrant.

We have related in considerable detail the evidence in the record bearing upon the amount of cooperation between the F. B. I. and the I. N. S. and, also, the extent to which the I. N. S. restricted its activities to performance of its statutory duties. We have done so because in our opinion this evidence bears importantly upon the "good faith" with which the I. N. S. agents conducted the search. It should be clear that we have no intention of suggesting that it would be improper for these two agencies of the Department of Justice to cooperate with each other.

ternational certificate of vaccination in the name of Martin Collins, (4) a bank book issued by the East River Savings Bank to E. R. Goldfus, and (5) several slips of paper which the agents observed Abel trying to secrete in his sleeve. Clearly the seizure of the first four items was wholly consistent with a search conducted to obtain evidence of alienage, for these items were "the instrumentalities and means" by which Abel was able to maintain his illegal status in this country. See *Harris v. United States*, supra, 331 U.S. at page 154, 67 S.Ct. at page 1103. And the fact that the agents limited themselves to only seizing these articles is convincing evidence that their search was conducted in good faith. The later seizure of the slips of paper by the I. N. S. agents does not reflect adversely on their good faith, for it is undisputed that these slips were taken only after Abel was detected trying to hide them. The agents' good faith obviously was not impugned by their seizure of what the arrested man had tried to hide.

C. Lawfulness of Seizure.

[9] The appellant contends, however, that even though the search was lawful and even though it was conducted in good faith, the seizure by the I. N. S. agents was unreasonable because the articles seized did not relate to the offense charged in the arrest warrant. We consider this contention only insofar as it pertains to the taking from Abel's person of the papers which he had attempted to hide, for as we have indicated above, with the exception of these papers, everything seized by the I. N. S. agents related to the offense charged in the warrant of arrest. In *Harris v. United States*, supra, agents of the F. B. I., acting under the authority of two warrants of arrest charging the defendant with mail fraud, went to his apartment and arrested him there. Incident to the arrest they searched the apartment and while they were doing

so discovered and seized eight Notice of Classification cards and eleven Registration Certificates, the possession of which by the defendant was in violation of the Selective Training and Service Act of 1940, 54 Stat. 885, now 50 U.S.C.A. Appendix, § 451 et seq., and of Section 48 of the Criminal Code, 35 Stat. 1098, 18 U.S.C.A. § 641. The defendant was later convicted upon an indictment charging him with unlawful possession, concealment and alteration of the seized articles. The admission into evidence of the seized articles, over objection of the defendant, was upheld by the Supreme Court on the ground that the F. B. I. agents had undertaken the search in good faith for the purpose of discovering evidence concerning the crime charged in the warrant. It is true that in *Harris* the seized objects were government property unlawfully in the possession of the defendant and that the Supreme Court somewhat relied upon that fact in holding them subject to seizure, see 331 U.S. at page 155, 67 S.Ct. at page 1103, but that circumstance would not appear to be a limiting factor upon the applicability of the *Harris* decision. Earlier in its opinion the Court had stated that "the objects sought for and those actually discovered were properly subject to seizure." 331 U.S. at page 154, 67 S.Ct. at page 1103. It then went on to differentiate between "merely evidentiary materials * * * which may not be seized * * * and * * * those objects which may validly be seized including the instrumentalities and means by which a crime is committed * * * and property the possession of which is a crime." Thus it appears that the circumstance that the seized articles in the *Harris* case were government property unlawfully in the possession of the defendant was relevant only insofar as it was necessary to show that because they were such articles they were among the four classes of items properly subject to seizure.¹¹ Cf. *Kelly v. United States*, 5

Cir., 1952, 197 F.2d 162; *United States v. Braggs*, 10 Cir., 1951, 189 F.2d 367. Similarly, the papers taken from Abel's person were subject to seizure, for it is clear that they were the "instrumentalities and means" by which he might commit the crime of espionage.

Of course, as Judge Learned Hand has observed in *United States v. Poller*, 2 Cir. 1930, 43 F.2d 911, at page 914, "[T]he real evil aimed at by the Fourth Amendment is the search itself * * *." Since the only proper motive which may impel government agents to conduct searches in connection with an arrest is the desire to obtain information which will be helpful in the prosecution of the crime for which the arrest is made, we well recognize that by placing "limitations upon the fruit to be gathered [from such a search we] tend to limit the quest itself * * *." *United States v. Poller*, supra, at page 914.

However, in a case such as the present one, where the trial court properly has been convinced that the motivation for the search is the hope of obtaining evidence of the offense for which the arrest is being made, the constitutional prohibition against unreasonable searches is not transgressed; and hence, when, during such a permissible search, articles within the categories enumerated in *Harris* that were not searched for are in fact discovered no useful purpose would be served by prohibiting seizure of them if they tend to prove the commission of a crime even though the crime be unrelated to the crime for which the arrest is being made. Here, obviously, any limitation we might put upon the use that can be had of articles uncovered by the search would not "tend to limit the quest * * *."

We construe the rule in *Harris* as not being limited to its own facts or to situations in which the seized objects uncovered in good faith by a not un-

crime is committed, (2) the fruits of the crime, such as stolen property, (3) weapons by which the escape of the person arrested might be effected, and (4) prop-

reasonable search happen to be contraband, for there is no valid distinction in holding lawful the seizure of contraband and in holding unlawful seizures of articles which fall within the other categories enumerated in that case. Therefore, we hold that the seizure by I. N. S. agents of the slips of paper which Abel attempted to secrete was not in violation of the Fourth Amendment.

II. Sufficiency of the Evidence.

[10] As we have previously indicated, the record contains more than ample evidence to establish that the appellant, while in this country, conspired with others to act on behalf of the Soviet Government. He contends, however, that there is inadequate evidence in the record to support the charges in Counts 1 and 2 of the indictment that the purpose of the conspiracy was to gather and transmit to the U. S. S. R. information relating to the national defense of the United States. In this connection, reliance is placed upon *United States v. Heine*, supra, in which we reversed a conviction under 50 U.S.C.A. § 34, the predecessor of 18 U.S.C. § 794 (d), because the evidence established that the information communicated by the defendant to the foreign government by whom he was employed was "lawfully accessible to anyone who was willing to take the pains to find, sift and collate it * * *." 151 F.2d at page 815. The appellant contends that there is no evidence in the record which indicates that he ever succeeded in communicating or conspired to communicate any information other than the type which we held could lawfully be sent abroad in the *Heine* case.

[11] It is true that there is no evidence indicating that Abel or his co-conspirators ever succeeded in gathering or in transmitting any unlawful information. There is not the slightest

erty the possession of which is a crime. 331 U.S. at page 154, 67 S.Ct. at page 1103.

11. The four classes of objects enumerated in *Harris* as properly subject to seizure

during a lawful search are: (1) the instrumentalities and means by which a

...with any success. However, appellant was charged with and convicted of having conspired with others in a criminal conspiracy to gather and transmit to the Soviet government secret information pertaining to the national defense of the United States, and the record is abundantly clear that Abel knew of the unlawful purpose of this conspiracy. The conspirators' lack of success, if indeed they were unsuccessful, does not lessen the criminality of their activities. *United States v. Rabinowich*, supra; *United States v. Morello*, supra.

Hayhanen was sent to this country by the Soviet government to act as Abel's assistant and for several years he acted in this capacity. During his direct examination he testified as follows:

"Q. Now, let me ask you this directly: What type of information were you seeking? A. Espionage information.

"Q. Would you describe that, what you mean by espionage information? A. By espionage information I mean all information what you can look to get from newspapers or official way, by asking from, I suppose, legally from some office, and I mean by espionage information that kind of information what you have to get illegal way. That is, it is secret information for—

"The Court: Concerning what? What kind of information?

"The Witness: Concerning national security or—

"The Court: What do you mean by that?

"The Witness: In this case United States of America.

"The Court: What do you mean by national security?

some military information or atomic secrets."

The appellant seeks to denigrate this testimony by characterizing it as a "clearly rehearsed statement of a legal conclusion." We do not so understand it. Hayhanen did not merely testify that the purpose of the conspiracy was to obtain "espionage information" or "secret information concerning the national security," but he specifically mentioned obtaining "military information or atomic secrets." His failure to elaborate in more detail concerning the information which the conspirators sought to acquire is readily explainable in light of his prior response to the following question:

"Q. During this conversation or during the receipt of these oral instructions from Pavlov,¹² did he give you any directions as to the type of information? A. Yes, he did.

"He told that it depends what kind of illegal agents I will have, so it depends then what kind of information they can give, where they work or whom they have as friends and such and such things. * * *"

Under these circumstances, it is not surprising that Hayhanen's testimony did not reveal any specific plans for obtaining secret information. His failure to so testify is indicative only of the fact that he had never been successful in his nefarious activities. He did, however, testify to a sequence of events which not only provided additional information tending to prove the purpose of the conspiracy but also tending to prove that Abel was aware of that purpose. This is the testimony relative to the attempts which he and Abel made, under orders from Moscow, to locate Sergeant Rhodes. The reason why Abel had been ordered to locate Rhodes has already been indicated:

espionage section of the Soviet State Security Service.

[Rhodes] could be a good agent because he is—some of his relatives are working on—and he—on military lands.

"He meant Quebec's brother, who was working somewhere—I cannot remember exactly, but in some atomic plant, or what it was."

Surely the jury was justified in inferring from this testimony that Abel and his co-conspirators were interested in establishing contact with Rhodes because of their belief that he was a potential source of secret atomic information.

Moreover, the jury cannot have failed to be impressed by the elaborate precautions taken by the conspirators to keep their activities secret. Men intent upon gathering and transmitting only such information as is available to the general public do not ordinarily find it necessary to employ secret codes; microdots; hollowed-out coins, pencils, or matchbooks; "drops"; and the variety of other devices which Abel and his colleagues used. To be sure, the defendant in Heine had employed devious methods to transmit information which this Court later held might lawfully be transmitted but our reversal of his conviction does not establish that evidence of such devious methods has no probative value. In Heine the information which the defendant had gathered and transmitted was known to the court. No room was left for inference. The present case is quite the contrary. Abel and his co-conspirators—unlike Heine and his—did not, as far as we know, succeed with their plans. Hence, an inference as to their purpose is properly drawn from the methods which they employed. We do not intimate that proof of the methods alone would be sufficient to sustain a conviction. We merely hold that the justifiable inference from the use of such methods by the appellant and his associates, when considered together with the other evidence which we have discussed, was sufficient to justify the jury in finding that the object of the conspiracy in the pres-

the U. S. S. R. information concerning the national defense of the United States which was not "lawfully accessible to anyone who was willing to take the pains to find, sift and collate it * * *" 151 F.2d at page 815.

III. Admissibility of Rhodes' Testimony.

[12] Roy A. Rhodes, a master sergeant in the United States Army, was called as a witness by the Government, and, insofar as relevant, testified substantially as follows: In 1951, at which time he had been in the Army for nearly a decade, he was assigned to serve as Motor Sergeant at the American Embassy in Moscow. When he arrived in Moscow, in May 1951, he was not accompanied by his family, but in December of that year he received notification that the Soviet government had granted visas to his wife and child and that they would be able to join him. To celebrate this good news, Rhodes had several drinks after lunch and before going back to work. When he returned to work he continued his drinking, now in the company of two Russian nationals who were employed at the Embassy garage apparently as assistants to Rhodes. Late that afternoon the girl friend of one of the Russians came to the garage with a female companion. It was suggested, and Rhodes agreed, that the two women, Rhodes, and one of the Russians employed at the embassy should go out for dinner. The foursome spent the evening together, dancing, drinking and eating. The following morning, according to Rhodes' testimony, he "woke up * * * in bed with this girl in what I had taken to be her room." He did not see this woman again for several weeks, but then, in response to a telephone call, he arranged a meeting with her. At this meeting he was told that "she has trouble." During the course of this discussion Rhodes and the woman were joined by two men, one of whom was introduced as the woman's brother, and the other as "Bob Day" or "Bob Smith." Rhodes thereafter had quite a number of meetings with Soviet citi-

12. Pavlov was named in the indictment as a co-conspirator and at the trial was shown to be in charge of the American

zens, some of whom were civilians and some of whom were members of the military. At these meetings Rhodes was given varying sums of money by the Russians, totaling between \$2500 and \$3000, in exchange for information which he gave them. The information for which he was paid concerned, *inter alia*, his duties at the embassy and the personal habits of American military and State Department personnel.

Rhodes also testified that in June 1953 he was transferred from Moscow to San Luis Obispo, California. Prior to his transfer, the fact of which he communicated to Soviet agents, he was given instructions as to how he might contact or be contacted by Soviet agents in the United States. Rhodes then testified that after he returned to this country he did not again have contact with agents

13. Arlene Brown was called as a witness by the Government. She testified that in the spring of 1955 she received a telephone call concerning her brother from a man who spoke with a very heavy accent.

14. Prior to the trial Rhodes had given statements concerning his activities in Moscow to the F. B. I. and to the Department of the Army. Both of these statements, in their entirety, were made available by the Government to counsel for the defense. Examination of the statements by defense counsel revealed a discrepancy as to one important particular in the two statements. However, as this discrepancy related to a matter which the Department of the Army considered classified information, Rhodes was not questioned about it on either direct or cross-examination. Instead, appellant's counsel and counsel for the Government stipulated that the trial judge should inform the jury that a contradiction as to this one particular existed between the two statements. Accordingly, prior to cross-examination of Rhodes, the judge stated to the jury:

"Members of the jury, as you probably realize, when we took a recess it was for the purpose of a consultation between the Court, counsel for both sides, and other representatives of the United States Government.

"As the result of that conference, it was brought to light that the witness Rhodes gave certain statements to the Army and to the F. B. I. during the

of the Soviet Government. In December 1953 he was transferred from San Luis Obispo to Fort Monmouth, New Jersey, then transferred to Fort Huachuca, Arizona, and then back to Fort Monmouth. During his second tour of duty at Fort Monmouth, Rhodes and his family lived in Eatontown, a town which is almost contiguous with Red Bank.

He also testified that during 1955 his father and his sister, Arlene Brown,¹³ lived in Howard, Colorado, a town near Salida, Colorado.¹⁴ Counsel for the appellant strenuously objected to Rhodes' testimony. At the trial, and now on appeal, they contend that his testimony was not relevant to any of the issues raised during the trial and that insofar as it contained a recitation of crimes in which the appellant was never shown to have participated, it was highly prejudicial to

month of June, 1957 and, I think, July and perhaps later.

"Those statements were the basis of the consultation.

"At the end of the discussion, which was quite informal, the United States concedes with respect to one item referred to in those statements this witness has made conflicting statements.

"The subject matter involved was not brought out on his direct testimony because, in the opinion of the Government, it would not have been in the interests of national security for that subject to have been inquired into.

"The conflict pertained to his version of his activities in Moscow, and an important incident which there occurred.

"Both counsel have agreed that since this concession is before the jury, namely the concession that the witness has made conflicting statements, the witness has been to this extent discredited. Such is the purpose of cross-examination.

"Counsel for both sides have agreed that no useful purpose would be served by pursuing the subject further."

The statements made by Rhodes to the Army and to the F. B. I. have been made available to this court, in their entirety, and have been examined by us. In our opinion, the trial judge's statement to the jury accurately reflected the substance of the discrepancy between the two statements, and the rights of the appellant were in no way prejudiced by the withholding from the jury of the subject matter of this discrepancy.

appellant. The Government, on the other hand, contends that Rhodes' testimony was admissible as tending to corroborate Hayhanen's testimony concerning the efforts made by him and Abel to locate Rhodes. It was upon this theory that the trial judge admitted the testimony.

The issue is not so much one of law as it is one of logic. The question to be answered is whether as a result of Rhodes' testimony we, or the jury, know more about the circumstances of this case than would have been known if the testimony had been excluded. We think it clear that the answer to that question must be stated in the affirmative. Hence we conclude that Rhodes was properly permitted to testify.

To be sure, Abel was not chargeable with responsibility for Rhodes' activities while the latter was in Moscow; but the fact that Rhodes had engaged in those activities, that he had notified Soviet agents of his transfer to the United States, and that arrangements were made whereby Rhodes and Soviet agents could contact one another in this country, lent credence to the testimony of Hayhanen that he and Abel, both agents of the Soviet Government, had received instructions to locate Rhodes and that they had made efforts to do so. Phrased somewhat differently, the effect of Rhodes' testimony was to better enable the jury to pass upon the credibility of a material portion of the testimony of Hayhanen. The jury determination as to whether Hayhanen spoke truthfully or falsely about the instructions he had received and the efforts made by him and Abel to locate Rhodes was materially aided by testimony tending to show that a strong motive existed to locate the latter. Rhodes' testimony provided that motive.

It should be borne in mind that this is not a case in which there has been an attempt to create an aura of credibility with respect to the testimony of an accomplice witness by introducing independent corroborative evidence of minor matters to which the accomplice testified. See *People v. Nitzberg*, 1941, 287 N.Y.

183, 38 N.E.2d 490, 138 A.L.R. 1253; *Commonwealth v. Holmes*, 1879, 127 Mass. 424; but cf. *Hoback v. United States*, 4 Cir., 1924, 296 F. 5, certiorari denied, 265 U.S. 594, 44 S.Ct. 638, 68 L.Ed. 1197; *United States v. Biebusch*, C.C.E.D.Mo.1880, 1 F. 213; *Aycock v. State*, 1940, 62 Ga.App. 812, 10 S.E.2d 84; *Ettinger v. Commonwealth*, 1881, 98 Pa. 338. Rhodes' testimony tended to prove the truth of Hayhanen's testimony, not because it tended to confirm some of the details of the latter, but because the circumstances which Rhodes related made it more likely that Rhodes was, as Hayhanen had testified, being sought by foreign espionage agents.

IV. *Alleged Deprivation of a Fair Trial.*

The final ground for reversal urged by the appellant is that during the trial a variety of minor errors occurred which, cumulatively, had the effect of depriving him of a fair trial. A careful perusal of the record indicates that this contention is unfounded. Although occasional error did occur at the trial—indeed, it would be somewhat surprising not to find minor error in the course of a trial lasting approximately two weeks—we cannot find that the appellant was injured thereby.

[13] The most important of these errors complained of by the appellant is the refusal of the trial judge to grant two motions, one made prior to trial and one at the close of the Government's evidence, to strike as surplusage a recital in the tenth paragraph of both the first and second counts of the indictment that it was a part of the conspiracy charged that Abel and his co-conspirators "would engage in acts of sabotage against the United States." See Rule 7(d) Fed. Rules Crim.Proc., 18 U.S.C. Even though we agree with the appellant that the reference to sabotage was surplusage, we are unable to see how that reference could have been prejudicial to his interests. As appellant points out, "sabotage," unlike the crime of "espionage" charged in the indictment, connotes violence and destruction and hence might tend to inflame the jury; but there was

no testimony in the case concerning sabotage or a conspiracy to commit sabotage, and the jury was carefully instructed by the trial judge that the indictment was not evidence and was not to be considered by them as evidence. Under these circumstances, we think that the failure of the trial judge to grant the motions to strike was such insubstantial error that it falls within the injunction of Rule 52(a), Fed.Rules Crim.Proc. Cf. *Catrino v. United States*, 9 Cir., 1949, 176 F.2d 884.

The appellant also alleges that a series of errors occurred during the examination of witnesses—particularly during the examination of Hayhanen. Thus, it is contended that Hayhanen was continuously led by the prosecutor, that the conversations with Abel to which Hayhanen testified were needlessly vague, and that a variety of improper questions were put to him. No purpose would be served by a detailed discussion of these alleged improprieties. As to some we do not find that any error was committed; others were matters within the discretion of the trial judge, who, in our opinion, did not abuse that discretion; and as to the remainder we think that the alleged errors were not so prejudicial as to require a new trial in this case where the "record fairly shrieks the guilt" of the accused. *Lutwak v. United States*, 1953, 344 U.S. 604, 619, 73 S.Ct. 481, 490, 97 L.Ed. 593.

Subsequent to his indictment the appellant requested the district court to appoint counsel for him, to be recommended by the local bar association. In accordance with this request, the district court appointed James B. Donovan as chief defense counsel. Arnold Guy Fraiman was subsequently appointed as associate defense counsel. Both at the trial and on this appeal these attorneys, together with Thomas M. Debevoise, II, who assisted them, have represented the appellant with rare ability and in the highest tradition of their profession. We are truly grateful to them for the services which they have rendered.

Affirmed.

Julius HYMAN, Appellant,
v.

Joseph REGENSTEIN (Continental Illinois National Bank & Trust Company of Chicago, Helen A. Regenstein, Betty R. Hartman and Joseph Regenstein, Jr., Co-Executors, substituted in place of Joseph Regenstein, deceased), Appellees.

No. 16816.

United States Court of Appeals
Fifth Circuit.

July 23, 1958.

Rehearing Denied Nov. 21, 1958.

Action by former employee of corporation against corporate director for alleged fraud, deceit and overreaching with respect to patents which employee had taken in his name and which had been held in prior litigation to belong to corporation. The United States District Court for the Southern District of Florida, George W. Whithhurst, J., dismissed employee's action, and employee appealed. The Court of Appeals, Wisdom, Circuit Judge, held that where question as to whether employee was obligated to assign his patents to corporation was basic in prior suits in which corporation was party and in which employee alleged fraud on part of director, director controlled corporation's participation in such suits, and participated in them, and suits were decided adversely to employee, doctrine of collateral estoppel by judgment was applicable in favor of director with respect to question of director's fraud in employee's subsequent action for alleged breach of fiduciary relationship, in view of fact that basic issue in such action was also question whether employee was obligated to assign patents to corporation.

Affirmed.

1. Judgment $\Rightarrow$ 634

Under doctrine of collateral estoppel by judgment, a judgment is conclusive evidence of some fact or issue common to different causes of action.

UNITED STATES of America

v.

John William BUTENKO and Igor A. Ivanov, Appellants.

UNITED STATES of America

v.

Igor A. IVANOV, Appellant.

Nos. 15170, 15232.

United States Court of Appeals
Third Circuit.

Argued June 17, 1966.

Decided Oct. 6, 1967.

The United States District Court for the District of New Jersey, Anthony T. Augelli, J., convicted one defendant, a defense plant employee of conspiracy to gather or deliver defense information to aid a foreign government, conspiracy to violate statute requiring registration of agents for a foreign government and failure to register with the Secretary of State as an agent of a foreign government, and convicted second defendant, a Russian National, of the two conspiracy charges. The defendants appealed and the appeals were consolidated. The Court of Appeals, Ganey, Circuit Judge, held, inter alia, that evidence that FBI agents observed meetings between employee of defense plant and members of United Nations Mission of the Soviet Union, that employee was acquainted with secret defense project and that employee's brief case was found in possession of Russian diplomat was sufficient to sustain employee's conviction of conspiracy to gather or deliver defense information to aid foreign government.

Judgment in appeal No. 15170 affirmed as to count one and judgment of acquittal directed on count two and judgment in appeal No. 11232 affirmed on all counts.

1. Conspiracy ⚡47

Evidence that FBI agents observed meetings between employee of defense plant and members of Soviet Union's

Mission to the United Nations, that employee was acquainted with secret defense project and that employee's brief case was in possession of Russian diplomat was sufficient to sustain employee's conviction of conspiracy to gather or deliver defense information to aid foreign government. 18 U.S.C.A. § 794(a, c).

2. Conspiracy ⚡47

Evidence that Russian National was observed in vicinity of clandestine meetings between defense plant employee and personnel of Russian Mission to the United Nations, Russian's association with the other Russians just prior to and immediately following meetings was sufficient to support Russian National's conviction for conspiracy to gather or deliver defense information to aid a foreign government. 18 U.S.C.A. § 794(a, c).

3. Conspiracy ⚡47

When it is established by circumstantial evidence or by deduction from facts from which a natural inference arises, that overt acts were in furtherance of a common design, intent and purpose, there is sufficient proof to establish a conspiracy.

4. Conspiracy ⚡47

Evidence in prosecution of Russian National on charge of conspiracy to violate statute prohibiting one, other than diplomatic or counselor officer, from acting as an agent of a foreign government without prior notification to the Secretary of State was not sufficient to establish that Russian National had knowledge that defense employee with whom Russian was dealing in transfer of defense documents had not registered as an agent for Soviet Union. 18 U.S.C.A. § 951.

5. Criminal Law ⚡1177

Where Russian National's sentence upon conviction for conspiracy to gather or deliver defense information in aid of a foreign government was within 30-year limit for such crime and sentence imposed upon conviction of conspiracy to violate statute requiring registration of agents for foreign government was for five years. Russian could not, on appeal, chal-

lenge his conviction on second charge. 18 U.S.C.A. §§ 794(a, c), 951.

6. Criminal Law ⚡1209

Where defendant was properly convicted and sentenced on first of two-count indictment to 20-year term of imprisonment and was sentenced to five-year concurrent sentence on second count, defendant's convictions would not be reversed on ground of double punishment when evidence was found insufficient to support conviction on second count. 18 U.S.C.A. §§ 794(a, c), 951.

7. International Law ⚡10.25

Whether defendant had registered as an agent of the Soviet Government was peculiarly within his own knowledge and defendant had burden to show more than mere denial of nonregistration in prosecution for failure to register with the Secretary of State as an agent of a foreign government. 18 U.S.C.A. § 951.

8. International Law ⚡10.25

Defense plant employee's meetings with members of Russian United Nations Mission personnel, and employee's transfer of classified documents to a member of the Soviet Mission was sufficient to establish that employee was acting as an agent of a foreign government. 18 U.S.C.A. § 951.

9. International Law ⚡10.24

Contractual relationship between defense plant employee and Soviet Government was not necessary to make employee who passed defense information to members of Soviet United Nations Mission an "agent" of the Soviet Government within statute requiring agents of foreign governments to register with Secretary of State. 18 U.S.C.A. § 951.

10. International Law ⚡10.24

One who acts directly or indirectly for the benefit of a foreign government is an "agent" within statute requiring one, other than a diplomatic or consular officer who acts as agent of foreign government to register with the Secretary of State. 18 U.S.C.A. § 951.

See publication Words and Phrases for other judicial constructions and definitions.

Evidence in prosecution of Russian National for conspiracy to gather or deliver defense information to a foreign government established that FBI agents had reasonable cause to arrest Russian without a warrant. 18 U.S.C.A. § 794(a, c).

12. Arrest ⚡63(4)

FBI agents had reasonable cause to believe that crime was being committed in their presence and that Russian National was one of coconspirators so that warrant for Russian's arrest was unnecessary where Russian was participating in clandestine meetings during which defense plant employee transferred classified defense documents to personnel of the Soviet United Nations Mission. 18 U.S.C.A. § 794(a, c).

13. Searches and Seizures ⚡7(10)

Where FBI agents had probable cause to arrest Russian National on charge of conspiracy to gather and deliver defense information to a foreign government and subsequent search of the Russian's automobile was closely related to his arrest, search of automobile without obtaining a warrant was reasonable. 18 U.S.C.A. § 794(a, c).

14. Ambassadors and Consuls ⚡3

Diplomatic immunity may be waived only on behalf of the sending state. Agreement Between the United Nations and the United States, § 15, 22 U.S.C.A. § 287 note; 22 U.S.C.A. § 252.

15. Criminal Law ⚡1165(1)

Where there was no showing that Soviet Government would have waived diplomatic immunity from compulsory process to testify in a United States court for three diplomatic personnel declared to be persona non grata even if diplomats had remained in the United States, defendants in prosecution for conspiracy to gather and deliver defense information to a foreign government were not prejudiced by the United States' declaring diplomats to be persona non grata. Agreement Between the United Nations and the United States, § 15, 22 U.S.C.A. § 287 note; 22 U.S.C.A. § 252.

LOS ANGELES COUNTY

16. Criminal Law $\S$ 627.7(3)

Before a defendant is entitled to the delivery of a statement in the possession of the prosecution relating to testimony on direct examination of witness, statement must relate to the subject matter of the testimony of the witness. 18 U.S.C.A. $\S$ 3500(b, e).

17. Criminal Law $\S$ 627.7(1)

If an entire statement in hands of prosecution does not relate to the subject matter of the indictment or information, the defendant is not entitled to a delivery of that statement over the objection of the prosecution. 18 U.S.C.A. $\S$ 3500(b, c).

18. Criminal Law $\S$ 627.7(3)

A defendant is not entitled to statements when they do not relate to the subject matter as to which the witnesses testified on direct examination, even though they relate to the subject matter of the indictment, information or investigation. 18 U.S.C.A. $\S$ 3500(b, c).

Samuel A. Larner, Budd, Larner & Kent, Newark, N. J., for appellant in No. 15,170 (Ivanov).

Raymond A. Brown, Jersey City, N. J., for appellant in No. 15,232 (Butenko).

Sanford M. Jaffe, Special Asst. to the Atty. Gen., Dept. of Justice, Washington, D. C., David M. Satz, Jr., U. S. Atty.,

1. These subsections read as follows: " $\S$ 794. Gathering or delivering defense information to aid foreign government

"(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic, negative, blueprint, plan, map, model, note, instrument, appliance, or information relat-

Newark, N. J., Edwin H. Stier, Asst. U. S. Atty., Barry D. Maurer, Asst. U. S. Atty., on the brief, for appellee.

Before GANEY and SMITH, Circuit Judges, and KIRKPATRICK, District Judge.

OPINION OF THE COURT

GANEY, Circuit Judge.

The appellants, John William Butenko and Igor A. Ivanov, were indicted by a federal grand jury in Newark, New Jersey, in a bill of indictment containing three counts. Count I charged conspiracy to violate the provisions of 18 U.S.C. $\S$ 794(a) and (c),¹ count II charged conspiracy to violate the provisions of 18 U.S.C. $\S$ 951,² and count III alleged a substantive violation against John W. Butenko alone in violation of 18 U.S.C. $\S$ 951. Both defendants were found guilty on all counts by a jury and sentenced to the custody of the Attorney General, Butenko for thirty years and Ivanov for twenty years on count I, both were given five years on count II and on count III Butenko was given a sentence of ten years, the sentences on counts II and III to run concurrently with those imposed on count I. From these judgments, appeals were taken to this court and the matter is now before us for disposition as the court permitted the government's motion to consolidate the appeals of both defendants.

ished by death or by imprisonment for any term of years or for life.

"(c) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy. * * *

2. This section reads as follows: "Agents of foreign governments

"Whoever, other than a diplomatic or consular officer or attaché, acts in the United States as an agent of a foreign government without prior notification to the Secretary of State, shall be fined not more than \$5,000 or imprisoned not

Under count I, a conspiracy was charged alleging an agreement among John W. Butenko and Igor A. Ivanov, as defendants, and Gleb A. Pavlov, Yuri A. Romashin and Vladimir I. Olenov, as co-conspirators, but not named as defendants, to unlawfully and knowingly conspire and agree to communicate and transmit to the Union of Soviet Socialist Republics, hereafter referred to as "U.S.S.R.", information relating to the national defense of the United States and, more specifically, information relating to the command and control system of the Strategic Air Command of the United States Air Force. It was further alleged that this activity was done with the intent and reason to believe that the said information would be used to the advantage of the U.S.S.R. The time within which the said conspiracy continued was from April 21, 1963, up to and including October 29, 1963.

The second count of the indictment charged Butenko and Ivanov, as defendants, and Pavlov, Olenov and Romashin, as co-conspirators, though not defendants, with conspiracy to violate 18 U.S.C. $\S$ 951. It alleged that John W. Butenko, not a diplomat or consular official or cultural attache, unlawfully and knowingly acted in the United States as an agent of the U.S.S.R. without prior notification of the Secretary of State of the United States, and that defendant, Igor A. Ivanov, and co-conspirators, Gleb A. Pavlov, Yuri A. Romashin and Vladimir I. Olenov, unlawfully and knowingly did aid and abet and induce John W. Butenko to so act.

The third count charged John W. Butenko alone with unlawfully and knowingly acting as an agent of the U.S.S.R. without notification to the Secretary of State of the United States and not then being a diplomat or consular official or cultural attache, with violation of 18 U.S.C. $\S$ 951.

The pertinent facts, for background, upon which the government relied for the conviction of the two defendants, as developed at the trial, are as follows: John W. Butenko, defendant, an Ameri-

can by birth, was an employee of the International Electronic Company, which is a subsidiary of International Telephone and Telegraph, and it was under contract with the United States Air Force to produce a command and control system for the Strategic Air Command. The project was given the name "465-L" and was an automatic electronic system which enabled the commander of the Strategic Air Command to alert and execute all his forces, at an extremely rapid rate to develop and plan his alternatives of operation and to give up to the minute status of the total force. Part of the operation of 465-L was the data transmission sub-system, whose function it was to permit rapid communication between Strategic Air Command headquarters and the various United States Air Force bases and missile sites. The four Strategic Air Command headquarters sites were located at Offutt Air Base, Nebraska; Westover Air Base, Massachusetts; Barksdale Air Base, Louisiana and March Air Base, California. It enabled the Strategic Air Commander to communicate with his bases at the speed of light. The operational breakdown of 465-L was divided into five sections, one of which was the field operations division, and defendant, John W. Butenko, was the Control Administrator for the same. It was the responsibility of the field operations division, and accordingly his, to check on installations and requirements at the various air and missile bases and handle arrangements with the United States Air Force for the actual installation, training of Air Force personnel, spare parts provisioning, as well as taking care of maintenance and handling general administrative duties. He applied for and was given top secret clearance which gave him access to documents of top secret, confidential and unclassified nature, as he could secure them on a need-to-know basis.

From July, 1961, to July, 1963, Butenko received monthly reports updating necessary information concerning current specifications required for the 465-L program which set out the title,

general subject matter, document classifications and specification numbers. The public did not have general access to the plant where Butenko was employed at Paramus, New Jersey, and the dissemination of the information concerning 465-L covered secret, confidential and unclassified information and even though some was unclassified, it could not be divulged to the general public unless permission from the Department of Defense and the Air Force was received. The contract between the Air Force and the Company was classified because parts of it were secret and top secret which made it a classified contract. The record discloses that all employees were made aware of the security requirements and were provided with a copy of the security manual which the defendant, Butenko, confirmed he had received.

The basis for the government's proof under the indictment was based largely on surveillance of the defendants and the co-conspirators by agents of the Federal Bureau of Investigation on April 21, 1963, May 26 and 27, 1963, September 23 and 24, 1963, and October 29, 1963.

Since the major contention of the appellants, both at argument and in their briefs, was that the evidence offered by the government was insufficient to support the averments in the indictment, and accordingly their convictions, it becomes necessary to recite in some detail much of the government's proof.

On April 21, 1963, the evidence showed that three agents of the Federal Bureau of Investigation conducted the surveillance, each testifying, sometimes piecemeal, as to the defendants' conduct, as one agent would have to break off surveillance and it would have to be taken up by another one, at a different position because of Soviet counter-surveillance, and the following was established: At 6:00 p. m., Agent Birch was in the Northvale, New Jersey area and took notice of a 1962 bluish-green station wagon, New York license plate No. 2N3078, with three Russian nationals seated therein, Igor A. Ivanov and Vladimir I. Olenov seated in the front seat with Gleb Pavlov.

who was driving. He kept the station wagon under surveillance until it stopped at a restaurant, Lou's Hitching Post, in Closter, New Jersey, and defendant, Ivanov, and Olenov left the station wagon to enter the restaurant, and they were observed sitting together at a table for some time. The agent then noticed the station wagon for some twenty minutes making a series of turns in the area and a little later noticed it with Pavlov at the wheel on the shoulder of Piermont Road in Closter, New Jersey, at a point opposite the China Chalet Restaurant, which is in the area, and, almost at the same time, he noticed a 1961 Ford Falcon, four-door, turning from the road into and through the parking lot of the China Chalet Restaurant. This car was driven by John Butenko and the agent was able to read the license plate as New Jersey AVV871. At this point another agent picked up the surveillance and testified that a few minutes after the four-door Falcon sedan went into and through the parking lot of the China Chalet Restaurant, he observed the station wagon driven by Pavlov entering the parking lot of the nearby Finast supermarket. Through binoculars, he observed Pavlov leaving the station wagon and walking about twenty-five feet to the Ford Falcon, bearing license No. AVV871, which had already arrived there, and sat down in the front seat of the Falcon beside Butenko who was in the car when Pavlov entered the lot. They both sat in the front seat, talked for a short period of time and then Pavlov left the Falcon, this time carrying a light tan attache case. He then walked back to the station wagon with the attache case, re-entered it and drove out of the parking lot. When he entered the Falcon he had nothing in his hand whatsoever. The Soviet station wagon then proceeded to the lot of Lou's Hitching Post restaurant to Ivanov and Olenov, where, on two different occasions, they were seen dining together and several minutes later surveillance disclosed Ivanov and Olenov no longer in Lou's Hitching Post restaurant and also that the Soviet station wagon was not in the parking lot. The agent

then saw Butenko, about ten minutes later, leave the Falcon in the Finast parking lot and walk for a few minutes to Piermont Road and then walk back to the Falcon and re-enter it. After about eight minutes more, Butenko again left the Falcon, walked slowly across the parking lot to Piermont Road where he met Pavlov and then walked out of his sight on Piermont Road, and Pavlov was not carrying an attache case. Some ten or fifteen minutes later, Pavlov and Butenko were seated together in Angelo's Closter Manor Restaurant, having dinner and conversing, and about fifty minutes later, the agent observed them paying the check and both Pavlov and Butenko left the restaurant and walked to Piermont Road, at which time surveillance was broken off. Butenko later admitted he had a tan attache case when he left home that evening but denied passing it to Pavlov.

On May 26, 1963, Agents Broderick, Mulvaney, McDougall, James, Conway and Ness, all of whom provided the testimony, observed the same Chevrolet station wagon driving back and forth past the Finast parking lot where Pavlov and Butenko had met on the night of April 21st. Ivanov was driving it with Olenov in the front seat and Pavlov in the rear. This unusual tactic was repeated three or four times. Earlier that evening, at about 5:15 p. m., Butenko was observed leaving his home in Orange, New Jersey, carrying a tan attache case and entering his car. He was observed driving from Orange, New Jersey, to Closter, New Jersey, where he arrived about 6:00 p. m., and a few minutes after he had parked his car on the Finast lot, the station wagon, now occupied only by Pavlov, entered the parking lot and then drove out, followed immediately by Butenko who proceeded to follow the station wagon. At 7:05 p. m., Pavlov and Butenko drove past the Old Hook Inn where Olenov and Ivanov, the defendant, were seen standing by the side of the road in front of the Inn. Some fifteen minutes later, Pavlov was observed driving into the parking lot of the Inn, picking up

Olenov and Ivanov and, after some conversation, the three men drove out of the lot. Later, at about 8:00 p. m., Butenko's car was observed in the parking lot of the Florentine Gardens restaurant which is about an hour's drive from the Old Hook Inn in the direction of Westwood, New Jersey, and Butenko could be observed in the bar until about 10:00 p. m. During this time he was seen leaving the restaurant on various occasions, going out to his car, opening the doors, looking in the front and back seats, as well as opening the trunk and feeling inside it. Finally, he entered his car and drove toward Orange, New Jersey, when observation was broken off. When Butenko testified in his own defense, he explained that his frequent trips to the car were made in an effort to find some lozenges.

It is submitted here that his conduct was conspiratorial and that surveillance rendered any passing of information impossible but which was accomplished the next day as here shown on May 27th.

The surveillance on May 27, 1963, was done by four agents of the F.B.I. At 3:45 p. m., Pavlov left the United Nations headquarters of the Soviet mission in New York, carrying a reddish-brown briefcase, tapered from bottom to top and accordion-like. A few minutes later, Ivanov was observed leaving the same building. At 5:45 p. m., Butenko left his work and drove to the Fort Lee area of New Jersey, and at approximately 8:00 p. m., Pavlov was seen standing next to a blue Falcon car bearing Butenko's license number, talking to a single individual sitting in the driver's seat of the blue Falcon. A half hour later, Butenko parked his car in the rear of 366 Park Avenue, Orange, New Jersey, near his home, and got out carrying a tan, reddish-brown briefcase, accordion-like and tapered from bottom to top. In his defense, he acknowledged coming home that evening with such a briefcase.

On the date of September 23rd, surveillance disclosed that Butenko came to an area described on exhibit G-19, which

is in or near Ridgewood, New Jersey, and also set out in exhibit G-30, later adverted to, and went up and down various streets making U-turns and following a circuitous pattern in a very unusual manner. The route taken on this day was described as a "dry-run". On September 24th, he took essentially the same route as that taken on September 23rd, with some minor deviations, and finally parked beside the Gold Key restaurant in the northern New Jersey area for some ten or fifteen minutes. During this time Pavlov and Romashin were standing across the road at a shopping center, looking in the direction of the Gold Key. About 8:20 p. m., the Falcon, with Butenko, left the Gold Key and drove south on Route 17, Pavlov and Romashin following in the Ford. The next observation of the Russian car was at about 9:10 p. m., when it was parked in a parking lot of Alexander's Shopping Center in Paramus, New Jersey, which is several miles from the Gold Key and a few minutes later, Romashin was seen to enter the car and drive out of the Alexander Center parking lot. At approximately 10:45 p. m., the Romashin car was proceeding west on Route 4 and an agent observed the Butenko car proceeding in the opposite direction, that is east, driven by Butenko and seated next to him was Gleb Pavlov. A review of G-19 and G-30, which was found later in Butenko's wallet, illustrates the above testimony.

On October 29th, 1963, the surveillance and arrest of the defendants was done by ten agents of the F.B.I. On that evening at seven o'clock, Butenko left his home in his blue Falcon sedan. He was carrying an attache case made of brown leather which he placed on the front seat and which was later introduced into evidence as G-28, Butenko acknowledging ownership of the case. He drove to Englewood, New Jersey, on the Garden State Parkway, and arrived there at a quarter to eight. Ivanov was observed at 6:00 p. m. in the vicinity of Englewood, New Jersey, driving a 1955 green Ford with Pavlov and Romashin as occupants. From 6:00 to 6:15 p. m., the three Rus-

sians were observed walking and driving in the vicinity of Dean Street, Englewood. The green Ford was seen at 7:00 p. m. at the Englewood railroad station and from 7:00 to 7:30 p. m. it was observed going back and forth across the railroad station parking lot and in and out of that station. During this period, there was extensive Soviet counter-surveillance and at one time Ivanov was driving and at another, Pavlov. At 7:37 p. m., Butenko's car was seen entering the railroad station and then leaving it and three minutes later, the Soviet automobile, with Pavlov, Romashin and Ivanov as occupants, left the railroad station. At 7:45 p. m., Butenko again drove in and out of the railroad station parking lot. At 7:55 p. m., Butenko's Falcon drove into the railroad station lot, parked, the headlights were turned off and the parking lights turned on. A few minutes later, the Soviet automobile, now driven by Pavlov with Ivanov in the right front seat, drove into the railroad station diagonally opposite to Butenko's automobile and the headlights were turned off and the parking lights turned on. After this signal was given, the Soviet car backed out of its parking space, came into the railroad station and parked perpendicular to the rear of the Falcon. Both cars remained in this position thirty-five seconds when the Soviet car pulled away toward the exit and the Falcon followed it. At 7:55 p. m., the Soviet automobile stopped at Grand Avenue and Tracy Place and Romashin left the car. Within two to three minutes, the F.B.I. moved in and arrested Butenko in his car, and some 200 to 300 feet away, Ivanov and Pavlov were arrested in the Soviet car. At the time of the arrest, Pavlov got out from behind the driver's wheel and Ivanov got out on the right side of the car.

It would seem that the evidence against Butenko was almost overwhelming as he had no valid reason for any association with Pavlov, Romashin and Olenov, who were Russian nationals attached to the Soviet mission to the United States, or with Ivanov, an employee of Amtorg Trad-

ing Company. His meetings with them in out-of-the-way places, in small communities in northern New Jersey can only be understandable if viewed, as they must be, in the light of the clandestine nature of them, at such hours as seven o'clock in the evening and in such places as parking lots behind supermarkets and railroad stations. None of the incidents hereinbefore recited were chance meetings, but gave every indication of being carefully worked out plans for the conspirators getting together.

The F.B.I. agents, following the arrest of the defendants, made an examination of the contents of the Soviet station wagon in which was found Butenko's attache case, two metallic electronic devices which were in fact signaling devices consisting of a transmitter and a receiver operating on a rechargeable battery, both of which devices were in excellent working condition, the receiver portion of the signaling device being found on the front seat where Ivanov and Pavlov had been sitting and the transmitter in a paper bag in the rear of the Soviet station wagon. In addition, in the shopping bag was found a radio with holes in the panel which, after its removal, there could be seen underneath the tube box a small compartment with a package which had been placed inside it, and when unwrapped, there was found a small camera in the guise of a cigarette case and two small film magazines. The cigarette case type camera was used primarily for photographing documents. There was no manufacturer's marking on it and it was custom-made. It had film in it fully loaded and ready to be operated.

Government exhibit G-28A was found in the briefcase of Butenko taken from the Soviet car. It described a major portion of the overall remote communications central located at the wing command post level, as well as the data located at the four major headquarter sites hereinabove referred to. It contained military and contract specifications which described the service conditions under which it was to be located and under which it must be operated; the

goodly portion of the document concerned itself with the performance of the concentrator which is indicated in the title of the document, "RCC" meaning "Remote Communications Central" located at the wing command level and the heading, "EDLEC" meaning "Electronic Data Local Communications Central" which was located at each of the four headquarter sites.

The document G-28B, likewise found in Butenko's briefcase taken from the Soviet car, contained the applicable military and contractor specifications, as well as the essential elements of the concentrator. It provided details of each of the characteristics in terms of voltage, wave shape of the various internal concentrator pulses, as well as a table showing the relationship between the 465-L field data code and each of the corresponding letters and numbers and symbols that are used in the system. It was a document showing the time that the equipment necessary for the concentrator is required to operate properly without any failure or lessening of its requisite function, as well as the "mean time repair" which it would take to repair any particular malfunction. It provided the cabinet drawings, sketches of cabinet assemblies and a full discussion of the various components that comprise the equipment described. The letters "A" and "B" after G-27 and G-28 indicate the first and second revision of the particular document, thus indicating its up-to-date revision which, as has been stated, was distributed to all key employees, including defendant Butenko. The information contained in both G-28A and G-28B related solely and directly to the 465-L system.

These documents found in the Soviet Union station wagon in the briefcase of Butenko, which briefcase had been transferred from Butenko to Pavlov, the actual observation of its transfer was not had, as can be readily seen, related directly and specifically to the national defense of the country and were carefully screened from the public eye, and were

not in the public domain and could only be released by permission of the Secretary of Defense. Butenko had access to these documents only because of his top secret clearance status.

At the same time that the Soviet car was stopped, the Butenko car was likewise stopped and he was placed under arrest by the F.B.I. agents and taken to the office of the F.B.I. in Newark, New Jersey. He was asked to empty his pockets, which he did, and extracted a wallet from the left rear side of his trousers, and in the wallet was found exhibit G-30 which was a small piece of, paper folded, one side of which was a diagram showing the exact route which Butenko had taken on the 23rd and 24th of September, and on it was the following markings: "N1. Forever, (if something) Englewood, last sund, every m. 7.00 p. m. N2. Next. Ridgwood, N.J. Sept. 22 7.00 p. m." On the back of the folded slip of paper were twenty-one separate five digit numbers, two were repeats and two were G-28A and G-28B, numbers: the government introduced in evidence the remaining seventeen documents marked G-40 through G-56D, which corresponded to the seventeen five digit numbers on the slip of paper. These documents were all related to the 465-L system and, while it was not shown that they were in the possession of Butenko, it was the government's contention that this was in reality an espionage shopping list and that their inclusion on the slip of paper with the route traversed by Butenko on September 22nd showed the full scope of the conspiracy and its ultimate aim which had to be known to Butenko since it covered such a wide range of documents.

In his defense, Butenko asserted that he had to approve, among other things, sub-contractor requisitions and to decide whether the work was necessary and whether the money for its performance was within the budget and in the course of this phase of his work it was requisite that he be acquainted with all the requisitions of the 465-L system and to keep up to date thereon and he was able to

do this by having the authority to secure any document that he deemed necessary on a need-to-know basis. This work which he and his associates were directly and indirectly responsible for in October of 1963 was worth about \$25,000,000. Likewise, he was a so-called "SRCC" (Simplex Remote Control Communicator), sub c Coordinator, and the "c" denotes its part of the 465-L equipment that was supposed to be at missile sites. He stated that since this equipment was in the development stage and there was no little confusion with respect to it his supervisor thought he would serve a very useful purpose as such Coordinator; that documents such as G-28A and G-28B supplied for him the necessary information to be helpful to him as he had to be closely associated with engineering proposals and that many times he took them home to study as well as examine them on other occasions when he was undisturbed by telephone calls and he further stated that G-28A and G-28B came from his file cabinets which were in an area assigned to him. He further testified that he never saw a top secret document all the time he was with the company and further that the briefcase which contained documents 28A and 28B were in his car and were taken from it by the agents at the time of his arrest and planted in the Soviet car.

He further testified that Pavlov was an individual known only to him as Lesnikopf whom he understood was somewhat vaguely related to affairs with the Soviet mission. He stated that initially his meetings with Lesnikopf were begun by Lesnikopf writing him a letter advising him that if he was interested in relatives in Russia he should meet him at the Chalet Restaurant in Closter and he would help him; that he went to the Chalet Restaurant, parked off the pavement when the man he knew as Lesnikopf came up to his car, asked his name and then invited him to dinner. They dined together and he kept meeting Lesnikopf (Pavlov) until the time of his arrest at the places the government witnesses testified they had placed him, but always

his reason for meeting Lesnikopf (Pavlov) was concerning information about his relatives in Russia. He denied that G-29, a wallet, and the slip of paper, G-30, on which was crudely drawn the streets which Butenko traveled on September 24th, and the digit numbers placed on the back thereof, hereinabove referred to, belonged to him, and that the reason G-28A and G-28B were found in his briefcase was that he secured them in order to read them at home and at other places at his convenience, undisturbed by telephone calls. In the main, this was the defense which Butenko interposed and, as has been indicated, after hearing all the evidence, he was found guilty by the jury.

[1] Accordingly, it is submitted that the evidence, as herein stated in detail, covering the surveillance by the F.B.I. agents of Butenko, coupled with the G-29 exhibit of the wallet and G-30, showed his full acquaintance with the aspects of the 465-L system and the finding of the documents, G-28A and G-28B in his own briefcase taken from the possession of Pavlov, in addition to his clandestine meetings with Pavlov and on two occasions the transfer of his attache case to him at these meetings, clearly meets the government's contention that there was sufficient evidence to sustain the averments in the indictments of the conspiracy therein alleged. This is not a case of mere suspicion. United States v. Bufalino, 2 Cir., 285 F.2d 408. Here, there was substantial evidence to buttress the conviction. United States v. Guiliano, 263 F.2d 582, 584 (3d Cir. 1959); United States v. Johnson, 4 Cir., 324 F.2d 264; Diaz-Rosendo v. United States, 9 Cir., 357 F.2d 124, 129; United States v. Georga, 210 F.2d 45 (3d Cir. 1954).

[2] As to Ivanov, while the evidence is less strong with respect to his participation in the conspiracy than that produced by the government against Butenko, since it is not as full nor as complete as against Butenko, as will be here indicated, sufficient evidence was offered by the government to show his intimate

involvement with the conspiracy. Briefly related, they consisted in the main of the following: His involvement with the activities of Pavlov on April 21, 1963, as hereinabove recited, his activities with Pavlov and driving the Russian station wagon on May 26, 1963, hereinbefore recited, and the unusual circuitous driving pattern he followed in the area, and his activities on October 29, 1963, when he was observed driving a green Ford with a New York license number in the vicinity of Englewood, New Jersey, with Pavlov and Romashin seated in the rear thereof. For some time the three men were seen walking and driving in the general vicinity of Englewood and when next seen the car was in the Englewood railroad station parking lot where it remained for more than a half hour when the car was then seen going back and forth across the parking lot, out of the station, up and down adjoining streets, at one point driven by Ivanov and at another by Pavlov. Finally, Ivanov parked the car and all three got out and stood in the rear of it and were looking across a street directly at Operandi's Restaurant some 250 feet away. The three Russian nationals stood for several minutes behind the car when Ivanov walked across the street to the restaurant and stood looking very intently up and down the street for a few minutes when he was joined by Romashin, and then both went into the restaurant. Pavlov left the rear of the car and drove to the back of a closed filling station, got out and stood behind the rear of his car and kept looking at the restaurant all the while. A few minutes later, he got into the car, drove twice around a small park which faced the restaurant and parked some 150 feet from it and sat there a few minutes until he was joined by Romashin and Ivanov and they all got into the car and drove away. Some twenty minutes later, the Falcon, driven by Butenko, drove into the railroad station lot, parked, turned off the headlights and turned on the parking lights and within a few minutes the Soviet automobile, now driven by Pavlov with Ivanov in the right front seat, came into the park-

ing lot, signaled by turning off headlights and turning on parking lights. Here, there was a direct confrontation between Ivanov and Butenko and several minutes later, when the defendants were arrested, the briefcase of Butenko was found in the Soviet automobile. All of this evidence which the government produced closely identifies Ivanov with the conspiracy in that his associations with Pavlov were marked by conduct shrouded by secrecy and concealment, as a lookout for Pavlov, as well as actively engaged in furthering the conspiracy as the events on the evening of October 29th disclose. Additionally, no evident reason was shown for Ivanov's presence in the small New Jersey communities, nor that he was, in being there, furthering the business of his employer, the Amtorg Trading Company, and, accordingly, the evidence yields no reasonable hypothesis of innocence on his part and, on the other hand, tends to show his direct participation in activities which could only be found to be conspiratorial in nature.

The second count in the indictment charges John William Butenko and Igor A. Ivanov with unlawfully, willfully and knowingly conspiring and agreeing with each other and with Gleb A. Pavlov, Yuri A. Romashin and Vladimir I. Olenov, co-conspirators but not named defendants, to commit offenses against the United States, to wit, to violate 18 U.S.C. § 951.

It was part of said conspiracy that Butenko did unlawfully, willfully and knowingly act in the United States as an agent of a foreign government, to wit, the Union of Soviet Socialist Republics, without prior notification to the Secretary of State, and that the defendant, Ivanov, and co-conspirators, Pavlov, Olenov and Romashin, did unlawfully, willfully and knowingly aid, abet and procure the defendant, Butenko, to act in the United States as an agent of a foreign government, to wit, the Union of Soviet Socialist Republics, without prior notification to the Secretary of State. In order to make proof of the averments

in the second count of the indictment, the conspiracy as alleged in count I formed the basis of the proofs in connection with count II. The only additional factor offered in evidence was that Butenko had not registered with the Secretary of State as an agent of a foreign government. This was proven by testimony of the government that Butenko had not registered. It would be pure repetition to advert again to the factual averments which make up the conspiracy under the first count, already mentioned in detail, and together with the additional fact of Butenko's failing to register, just averted to, this it is contended by the government proves the allegations of the indictment under count II. With this we cannot agree.

[3-6] It is submitted that an essential element in the proof of the conspiracy here obtaining must be that Ivanov and the other alleged co-conspirators had knowledge of the fact that Butenko had not registered as an agent of a foreign government, either directly or indirectly by a compelling inference. It is sufficient, as we have indicated, that when there is established by circumstantial evidence or by deduction from facts from which a natural inference arises, that the overt acts were in furtherance of a common design, intent and purpose, there is sufficient proof. While the circumstances obtaining here show clandestine meetings and secretive conduct on the part of Ivanov, as set forth heretofore, they advance us not at all, in supplying the factual issue of knowledge on the part of Ivanov and the others that Butenko had not registered. Ivanov was an employe of the Amtorg Trading Company, unlike Pavlov, Olenov and Romashin, who were attaches of the Russian mission to the United Nations, and, while it might be inferred that the latter could have had knowledge of the plan that Butenko was not registered with the Secretary of State, by virtue of their high position in the Soviet mission to the United Nations, this inference could not be drawn against Ivanov, a mere employe of Amtorg. Here, knowledge of the

fact, on the part of Ivanov, that Butenko had not registered, was a basic matter of proof which, as has been indicated, the record did not disclose. *Ingram v. United States*, 360 U.S. 672-678, 79 S.Ct. 1314, 3 L.Ed.2d 1503; *von Clemm v. Smith*, D.C., 255 F.Supp. 353, 368, aff'd 2 Cir., 363 F.2d 19. The fact that the government, in the introduction of exhibit G-16, showed that Ivanov had filed a statement with the Department of State showing his familiarity with the Foreign Agents Registration Act of 1938, as amended, under which there was a heading, 1(a) of instructions, which stated, quoting portions of the Act of June 25, 1948, wherein it was provided that no person other than a diplomat or consular officer or attache should act in the United States as an agent for a foreign government without prior notification to the Secretary of State, this showed only that he was familiar with the fact of registration, but it furthers, in no wise, the necessary essential that he knew Butenko had not registered as a foreign agent. Accordingly, it is submitted that, with respect to Ivanov, as to count II of the indictment, there must be a judgment of acquittal for lack of sufficient proof thereunder. However, this makes no difference in the disposition of the case because the sentence imposed on Ivanov under count I was for twenty years, which was within the limits of that permitted by the statute whose maximum was thirty years, and since the current sentence imposed under count II was five years, Ivanov cannot, on appeal, challenge his conviction on count II. *Lawn v. United States*, 355 U.S. 339, 359, 78 S.Ct. 311, 2 L.Ed.2d 321, citing *Sinclair v. United States*, 279 U.S. 263, 299, 49 S.Ct. 268, 73 L.Ed. 692; *Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774. The appeal of double punishment with regard to the double conviction on both counts I and II cannot be considered a ground for reversal. *United States v. Goldman*, 352 F.2d 263 (3d Cir. 1965).

[7] As respects Butenko's situation with reference to count II, it is sub-

mitted he knew he was not registered and the burden of proof was cast upon him to show more than mere denial since it is always an essential element of a crime such as this since the burden of going forward on the issue is placed on a defendant where, as here, the matter is peculiarly within his own knowledge. *Edwards v. United States*, 5 Cir., 334 F.2d 360, 366; *Blumenthal v. United States*, 8 Cir., 88 F.2d 522. However, Butenko's conviction on count II, even if we assume no conspiracy was shown by reason of lack of knowledge on the part of Pavlov, Romashin and Olenov that he was not registered, nevertheless does not affect the term of his sentence, as the same reasoning is applicable here as to that concerning Ivanov in count II hereof by reason of the fact that the sentence imposed on Butenko on count II, since it ran concurrently with that imposed on count I, being ten years, was, likewise, within the term validly imposed in count I. *Lawn v. United States*, supra, et al.

[8-10] Similarly, it is unnecessary for us to consider the contentions of Butenko as to count III of the indictment in view of *Lawn v. United States*, supra, 355 U.S. at 359, 78 S.Ct. at 322. However, as to this count, which charges Butenko with the substantive offense of failing to register as an agent of a foreign government, there can be no question that he did not register as a foreign agent, as the record shows, and, accordingly, he knew that he had not registered as a foreign agent. Much was made in argument that Butenko was not an agent of the Soviet Union in that there was shown no contractual relationship between himself and the Soviet Union. However, this is not requisite nor necessary. As we have shown, as adverted to previously, the conduct of Butenko in connection with the transfer of classified documents to a representative of the Soviet mission, Pavlov, was sufficient to bring Butenko within the provisions of the statute. Furthermore, as has been indicated, a contractual relationship is unnecessary since the act it-

self does not define the word "agent". The few judicial decisions in the field do not discuss the definition in any detail. The cases assume that it means one who acts directly or indirectly for the benefit of a foreign government. *von Clemm v. Smith*, supra; *von Clemm v. United States*, 320 U.S. 769, 64 S.Ct. 81, 88 L.Ed. 459; *Hansen v. Brownell*, 98 U.S.App.D.C. 239, 234 F.2d 60; *United States v. Heine*, 2 Cir., 151 F.2d 813, 817.

Appellants also question whether or not the object of the conspiracy concerned national defense. Here the matter was left entirely in the jury's hands under proper instruction in conformity with *Gorin v. United States*, 312 U.S. 19-32, 61 S.Ct. 429, 439, 85 L.Ed. 488, wherein the court said, in part: "It is not the function of the court, where reasonable men may differ, to determine whether the acts do or do not come within the ambit of the statute. The question of the connection of the information with national defense is a question of fact to be determined by the jury as negligence upon undisputed facts is determined."

A critical examination of the court's charge relative to the crime of conspiracy leaves no room here for exception, as it was done correctly, at length and with great clarity.

DISCUSSION OF OTHER LEGAL POINTS RAISED.

[11-13] A point raised is the District Court's refusal to suppress certain physical evidence because of an assertedly unreasonable search and seizure. On the record, agents of the F.B.I. had reasonable cause to arrest Ivanov without a warrant. As to Butenko, he was arrested pursuant to a warrant already obtained. They also had reasonable cause to believe that a crime was being committed in their presence and that Ivanov was one of the co-conspirators. It was not necessary under the circumstances for them to have obtained a warrant for his arrest. *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). Nor was

it necessary for them to have obtained a warrant to search the green Ford sedan. The agents' subsequent search of that car was closely related to the reason Ivanov was arrested. *Cooper v. State of California*, 386 U.S. 58, 61-62, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967); *United States v. Dento*, 382 F.2d 361, (C.A. 3, August 2, 1967). Likewise, the district court did not err in refusing to suppress the evidence in question.

Another point raised on appeal is the defendants' contention that by reason of the action of the State Department they had been deprived effectively of their right under the Sixth Amendment to have compulsory process for obtaining the attendance of witnesses in their behalf.

On October 30, 1963, the State Department caused a diplomatic note to be sent from the United States Mission to the United Nations to the Permanent Mission of the Union of Soviet Socialist Republics to the United Nations concerning the involvement of Olenov, Pavlov and Romashin in espionage activities against the United States. In that note, the three accredited representatives of the Soviet mission were declared *persona non grata* because they had violated § 13(b) of the Headquarters Agreement between the United Nations and the United States. 22 U.S.C.A. § 287 note. The note requested that the three named representatives depart the United States on or before November 1, 1963. On the latter date counsel for Butenko, in a telegram addressed to the State Department, requested a stay of the terms of the diplomatic note to give him an opportunity to confer with the three representatives before they departed. On the same day the State Department sent a telegram to Butenko's counsel advising him that the departure request would be superseded until November 4, 1963. However, the three Soviet representatives departed the same day the telegrams were exchanged. From the time they departed, the precise whereabouts of the three Soviet representatives were

unknown to defendants. The prosecution admits that they were beyond the jurisdiction of the district court.

Some months before the trial, District Judge Anthony T. Augelli signed an order on August 6, 1964, granting Butenko's request to take the deposition at government expense of the three former Soviet representatives to the United Nations, provided that Butenko could show that the three representatives would be willing to testify at oral deposition and that the Soviet Union would permit such an examination or would insist that Letters Rogatory be used. Approximately a month later, Butenko's counsel informed the district court that he was unable to secure any answer from the Soviet authorities with regard to the satisfaction of the conditions of the Court's order of August 6th, and requested a continuance for additional time to obtain a response from the Soviet government. The request was denied, the Court stating that more than sufficient time had been allowed to appellants.

[14] It is submitted that the United States is not to be penalized for the inability of defendants to summon the three former Soviet representatives in their defense nor be required to forego prosecution until it produces those three individuals. By virtue of § 15 of the Headquarters Agreement the three Soviet representatives were "entitled in the territory of the United States to the same privileges and immunities, subject to the corresponding conditions and obligations, as it accords to diplomatic envoys accredited to it." A diplomatic envoy accredited to the United States is immune from compulsory process to testify in a court of the United States. *Rev.Stat. § 4063*, 22 U.S.C.A. § 252; *Dupont v. Pichon*, 4 U.S. (4 Dall.) 321, 1 L.Ed. 851 (1805); *Restatement (Second), Foreign Relations Law § 73*. Such immunity may be waived only on behalf of the sending state. *Restatement (Second), Foreign Relations Law § 79*. Here the State Department treated the three Soviet representatives as having been en-

titled to diplomatic immunity.³ To end that status the State Department declared them to be *persona non grata*. Although their diplomatic immunity ended when they departed, all three from the time of their departure were beyond the jurisdiction of the district court and not available for any purposes to either the United States or the defendants.

[15] But even if the State Department had not made the declaration and the three representatives had remained in the United States, there has been no showing that the Soviet Government would have waived the diplomatic immunity of the three and permitted them to testify in court and even indicate what they would say if they were permitted to testify. On the contrary, the record shows that the Soviet authorities have ignored the request by counsel for Butenko for permission to permit the three former representatives to testify by deposition or answer Letters Rogatory. Since the immunity is waived by the Sovereign and not the individual, as indicated, there is no showing that it would be waived or that their testimony would be favorable to the defense. Accordingly, no prejudice is found by reason of their departure.

Next, defendants claim the trial court committed reversible error in refusing to permit counsel to examine memoranda and reports of government agents which related to the subject matter of the indictment but not to the direct testimony of the agents who testified on behalf of the prosecution. In other words they contend that where an agent participated in more than one aspect of an investigation, but is called upon by the prosecution to testify only as to less than all of those aspects, his report relating to all other phases must be provided for the benefit of defense counsel pursuant to subsection (b) of § 3500 of the so-called Jencks Act, 18 U.S.C.A. § 3500(b).

During the course of the trial, after government agents testified on direct examination the prosecution made available to defense counsel those reports which

it believed related to the testimony given by that particular witness. In each instance the trial judge declared a recess for the purpose of his examining additional reports to determine whether he should order the prosecution to deliver them to defendants for their examination and use. After he had examined those reports, the trial judge found that they did not relate to the subject matter to which the witness had just testified on direct examination. He therefore refused to instruct the prosecution to deliver them directly to the defendants.

[16-18] Before a defendant is entitled to the delivery of a statement it must not only be one within the meaning of subsection (e) of § 3500, but it must also comply with the provisions of subsection (b) of this section.⁴ Clearly if the entire statement does not relate to the subject matter of the indictment or information, the defendant is not entitled to a delivery of that statement over the objection of the prosecution. *Rosenberg v. United States*, 360 U.S. 367, 370, 79 S.Ct. 1231, 3 L.Ed.2d 1304 (1959). And in our opinion a defendant is not entitled to statements when they do not relate to the subject matter as to which the witness has testified on direct examination, even though they relate to the subject matter of the indictment, information or investigation. See, for example:

4. Section 3500(b) of the Jencks Act provides: "(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of defendant, order the United States to produce any statement * * * of the witness in the possession of the United States which *relates to the subject matter as to which the witness has testified*. If the entire contents of any such statement *relate to the subject matter of the testimony of the witness*, the court shall order it to be delivered directly to the defendant for his examination and use." (Emphasis added.)

5. Senate Report No. 981 to the bill to amend the Criminal Code to provide for

United States v. Donlon, 256 F.Supp. 336, 341-343 (D.C.Del.1966), *aff'd per curiam* 370 F.2d 987 (C.A. 3, 1967); *United States v. Birnbaum*, 337 F.2d 490, 497-498 (C.A. 2, 1964); *United States v. Heap*, 345 F.2d 170 (C.A. 2, 1965); *United States v. Umans*, 368 F.2d 725, 731 (C.A. 2, 1966); *Williamson v. United States*, 365 F.2d 12, 15-16 (C.A. 5, 1966); *Oertle v. United States*, 370 F.2d 719, 723-725 (C.A. 10, 1966). In addition to setting forth the conditions under which it was to be delivered over to the defendant, Congress was very careful in limiting the type of statement that was to be so delivered. Subsection (b) contains but two sentences. In the first Congress referred to the statement as one which relates to the subject matter "as to which the witness has testified." In the second as being one which relates to the subject matter of "the testimony of the witness." And in subsection (c) to this section it refers to the statement twice as one which does not relate or relates to the subject matter of "the testimony of the witness."⁵

Other points raised by the appellant are devoid of merit and are not discussed.

The judgment in appeal No. 15170 as to Ivanov is affirmed as to count I and a judgment of acquittal is directed to be entered on count II thereof. The judgment in appeal No. 11232 as to Butenko is affirmed on all counts.

the production of statements and reports of government witnesses refers to them as follows:

"* * * relating to matter as to which the witness has testified.";

"* * * touching the events and activities as to which a Government witness has testified at trial, * * *";

"* * * relate to the subject matter of the testimony of the witness.";

"* * * relate to the testimony of the witness at trial";

and

"* * * relates to the testimony of the witness."

See 1957 U.S.Code Cong. and Adm. News. pp. 1861, at 1862 and 1864.

J. JOSEPH SMITH, Circuit Judge
(dissenting):

I dissent.

As indicated in my dissent in *United States v. Robinson*, decided today, I believe that *Escobedo v. Illinois* requires us to reverse this conviction, founded in part on Cone's statements to the agents after his arrest, when he had not been advised of his right to counsel or his right to remain silent. There can be no question but that the criminal process had shifted from investigatory to accusatory and had focussed upon Cone. The marihuana had been intercepted and followed to the addressees. They had given statements accusing Cone and detailing the planned delivery to Cone, thereupon carried out under the surveillance of the agents and followed to Cone's possession at the agreed place of delivery. The investigation was complete, the agents had learned that Cone had shipped the drug from Panama to himself at New York. Without limitation of the rights and duties of the agents to continue investigation as to the involvement of others, *Escobedo* makes it plain that the use against Cone of self-incriminatory statements elicited for that purpose by agents after he became the target of the investigation and had indeed been arrested for the crime and was without counsel is forbidden. The Constitution requires that his right to counsel be enforced unless competently waived—and there can be no serious claim of waiver here.

It is possible to read *Escobedo* very narrowly and confine it to its particular facts, but I submit that this does violence to the opinion's explanation of the rationale of the holding and to the dissenters' understanding of what the Court's opinion meant. Moreover, grudging inch by inch acquiescence can only prolong litigation and the uncertainty of enforcement officials and delay steps to improve promptness in assuring the provision of counsel and development of alternative investigatory techniques. I would reverse for new trial with Cone's admissions after arrest, in the absence of counsel, excluded.

UNITED STATES of America,
Appellee,

v.

Nelson Cornelious DRUMMOND,
Appellant.

No. 310, Docket 28710.

United States Court of Appeals
Second Circuit.

Argued Jan. 28, 1965.

Submitted to the in banc Court
May 26, 1965.

Decided Dec. 2, 1965.

Defendant was convicted of conspiracy to violate Federal Espionage Act after a trial before the United States District Court for the Southern District of New York, Thomas F. Murphy, J., with a jury, and from the judgment of conviction and from an order denying his motion for new trial, the defendant appealed. The Court of Appeals, Kaufman, Circuit Judge, held, inter alia, that under the circumstances the inculpatory statements of defendant were properly received in evidence, and that there was no merit in challenges to trial court's evidentiary ruling and charge.

Affirmed.

Waterman, Smith and Anderson,
Circuit Judges, dissented.

1. Courts ⇨101

Because appeal raised vital questions of judicial administration of the criminal law requiring interpretation of opinions of Supreme Court of the United States, Court of Appeals directed consideration of appeal in banc.

2. Criminal Law ⇨1036(1)

Court of Appeals would consider admissibility of inculpatory statements made following arrest and preceding trial notwithstanding testimony concerning such admissions was received in evidence without objection at time of its introduction where Court of Appeals would be compelled to overturn conviction if de-

fendant's critical admissions should have been excluded.

3. Criminal Law ⇨406(1)

In prosecution for conspiracy to violate Federal Espionage Act, spontaneous admissions immediately following arrest during defendant's trip to F.B.I. headquarters were properly admitted. 18 U.S.C.A. § 794(c).

4. Criminal Law ⇨1134(2)

Where F.B.I. log of interview which was marked for identification and given to defense counsel in prosecution for conspiracy to violate Federal Espionage Act was not introduced in evidence, and defendant never contended at trial that he had been denied his constitutional right of access to counsel, so that government was denied opportunity to offer the inculpatory evidence, to avoid penalizing the government for failing to respond at trial to a contention permitted to be raised for first time on appeal, Court of Appeals would exercise its power to consider the exhibit marked for identification. 18 U.S.C.A. § 794(c).

5. Criminal Law ⇨517(1)

Confessions obtained under circumstances regarded as socially or morally indefensible cannot form the basis of criminal convictions; the dominant principle is that a man should not be compelled to incriminate himself against his life and it makes little difference whether a man's will be broken by a physical brutality or more subtle psychological pressures. U.S.C.A.Const. Amends. 5, 6, 14.

6. Constitutional Law ⇨266

Criminal Law ⇨393(1), 517(1)

The privilege against compulsory self-incrimination of the Fifth Amendment and the due process clause of the Fourteenth Amendment are invoked to bar use of confessions tainted by oppressive police behavior, but this is not the only constitutional restriction upon use of confessions in criminal prosecution; there is a point—whether or not prosecution has been formally commenced by indictment or arraignment—when Sixth Amendment right attaches

and accused is entitled to assistance of counsel, and if counsel is denied after that point has been reached, confessions subsequently obtained must be excluded. U.S.C.A.Const. Amends. 5, 6, 14.

7. Criminal Law ⇨516

The fact that use of confessions must necessarily be restricted in particular instances does not evidence a "public policy" against use of confessions per se; there can be no sound public policy requiring law enforcement and prosecutory agencies affirmatively to prevent or deter individuals from confessing that they have engaged in unlawful conduct. U.S.C.A.Const. Amends. 5, 6, 14.

8. Criminal Law ⇨517(1)

Neither the privilege against self-incrimination nor the right to counsel was designed affirmatively to encourage sealed lips; they were intended, at least in part, to protect the innocent as well as the guilty from immoral and unethical methods, incompatible with humane law enforcement, which act as stimuli for confessions. U.S.C.A.Const. Amends. 5, 6, 14.

9. Criminal Law ⇨517(1)

Confessions are not suspect per se; it cannot be said that an individual who confesses has by that deed alone acted unreasonably or under compulsion; often the conscience of an accused prods him to confess, and alternatively, expectation that independent investigation will lead to evidence sealing a conviction, or calculation of a quid pro quo in form of a lenient sentence, can motivate a course of full disclosure. U.S.C.A.Const. Amends. 5, 6, 14.

10. Criminal Law ⇨406(1), 517(1)

The social policies underlying privilege against self-incrimination and the right to counsel have, at times, required that certain confessions be held inadmissible in particular criminal trials, but this does not require that all confessions—with or without counsel—must necessarily be excluded under any and all circumstances, or even that all admissions of an accused be regarded as somehow "sus-

picious or unworthy of belief. U.S.C.A. Const. Amends. 5, 6, 14.

11. Criminal Law ⇨406(2)

The absence of counsel at time admissions are made does not inevitably compel a finding of inadmissibility. U.S.C.A.Const. Amend. 6.

12. Criminal Law ⇨641(1)

The Sixth Amendment does not require a per se rule barring the police from a reasonable period of privacy with a reasonably intelligent man who has just been placed under arrest and advised of his rights to remain silent and to counsel. U.S.C.A.Const. Amend. 6.

13. Criminal Law ⇨406(2)

The coercive or noncoercive context in which admissions were made: that is, the spontaneity or responsive nature of statements, the physical conditions of interrogation, the period lapsing after arrest before statements were made, the intelligence level of defendant, his legal sophistication, his subjective state of mind and health are all revelant to ultimate determination of admissibility of admissions made in absence of counsel. U.S.C.A.Const. Amend. 6.

14. Criminal Law ⇨641(1)

A decision based on constitutional fiat is not a desirable method for reaching an informed resolution of the pre-trial access to counsel problem; such question can best be answered after the investigative, experimental, and interest-balancing methods of the legislature are utilized. U.S.C.A.Const. Amend. 6.

15. Criminal Law ⇨1169(12)

Defendant charged with conspiracy to violate Federal Espionage Act was not prejudiced by admission of prearraignment statements even if defendant had requested a lawyer during preliminary interview, where defendant had been given standard F.B.I. warning, including advice as to his right to counsel, defendant had already made elaborate disclosures of his involvement with espionage conspiracy and interview had proceeded for several hours without any prior re-

quest for counsel, especially in view of defendant's continued, almost compulsive, willingness to cooperate with his interviewers over the next several days. 18 U.S.C.A. § 794(c); U.S.C.A.Const. Amend. 6.

16. Criminal Law ⇨412(2)

In determining whether prearraignment statements were admissible in prosecution for conspiracy to violate Federal Espionage Act, preliminary questioning of defendant was justified to expose and apprehend his coconspirators and to gain an early assessment of damage defendant had done his country's military security. 18 U.S.C.A. § 794(c).

17. Criminal Law ⇨412(2)

Where an intelligent defendant, fully warned of his rights, nevertheless clearly evinced a strong desire to cooperate and made elaborate disclosures before his earliest request for counsel, the failure to comply with his request at that time would not void the statements. U.S.C.A. Const. Amend. 6.

18. Criminal Law ⇨1043(3)

Contention that defendant's admissions during prearraignment interview should have been excluded because obtained during an unreasonable delay in arraignment contrary to mandate of federal rule would not be considered where defendant failed to object on such ground at trial. Fed.Rules Crim.Proc. rule 5(a), 18 U.S.C.A.

19. Constitutional Law ⇨43(1)

Courts indulge every reasonable presumption against the waiver of fundamental constitutional rights, but such rights may be waived.

20. Constitutional Law ⇨43(1)

A waiver of constitutional rights can only have validity if it represents an intentional relinquishment or abandonment of a known right or privilege, and whether there has been an intelligent waiver must be determined ad hoc, depending in each case upon particular facts and circumstances surrounding the event.

21. Criminal Law ⇨641(1)

Court must be mindful at all times of background, experience and general conduct of accused alleged to have waived the right to counsel. U.S.C.A.Const. Amend. 6.

22. Criminal Law ⇨641(1)

While applicable legal rules do not change merely because accused is charged with espionage, question of waiver of right to counsel cannot be divorced from nature of the crime. 18 U.S.C.A. § 794(c); U.S.C.A.Const. Amend. 6.

23. Criminal Law ⇨406(2)

Under circumstances including showing that after being arrested in possession of classified documents in company of Russian espionage agents it took defendant but a few minutes to decide to "spill the beans", that defendant initiated a number of interviews thereafter and spent interludes between them recalling details which might aid the investigation, and that defendant was fully informed of his right to counsel at every interview, there was a clear, knowing waiver of any right to counsel during prearraignment stage of interrogation so that prearraignment admissions were properly admitted. 18 U.S.C.A. § 794(c), U.S.C.A.Const. Amend. 6.

24. Criminal Law ⇨406(2)

Defendant charged with violating Federal Espionage Act waived his right to counsel during post-arraignment interviews in Federal House of Detention, so that admissions made during such interviews were properly admitted, in view of record including showing that defendant initiated the interviews himself, was advised of his rights prior to each interview and after first interview was permitted to call his wife, and defendant was told by interviewing agent, "Any time you don't want to be interviewed, you just say so and I will not come back here". 18 U.S.C.A. § 794(c), U.S.C.A.Const. Amend. 6.

25. Criminal Law ⇨1189

In light of evidence, principally the testimony of defendant himself, Court of Appeals would not remand case for hear-

ing on issue of defendant's waiver of counsel during post-arraignment interviews where facts concerning alleged deprivation of counsel were fully elucidated during the trial and were before the Court of Appeals. U.S.C.A.Const. Amend. 6.

26. Constitutional Law ⇨43(1)

The Fifth and Sixth Amendments may be designed to protect quite different values but in concrete situations they may often provide precisely the same protection which can be waived in precisely the same way. U.S.C.A.Const. Amends. 5, 6.

27. Criminal Law ⇨406(2)

Admissions made during post-indictment interviews were properly admitted at trial against defendant charged with violation of Federal Espionage Act, where such statements were elicited only after defendant and his attorney had conferred and given their consent to interrogation. 18 U.S.C.A. § 794(c).

28. Criminal Law ⇨406(2)

In prosecution for violating Federal Espionage Act, post-indictment admissions could not be considered tainted so as to be inadmissible even if some of earlier statements were barred, where two full months passed between the two series of interviews, and although defendant was in jail during that interval, he consulted freely with his counsel and his wife, and alleged earlier taint could not have marred fruitful product of defendant's continued cooperation. 18 U.S.C.A. § 794(c).

29. Conspiracy ⇨48

In prosecution for conspiracy to violate Federal Espionage Act forbidding conspiracy to transmit information "relating to the national defense", whether documents defendant conspired to transmit were of such character was for jury. 18 U.S.C.A. § 794(c).

30. Conspiracy ⇨48

Criminal Law ⇨800(2)

In prosecution for conspiracy to violate Federal Espionage Act, instructions that term "national defense" is a generic

concept of broad connotation referring not only to military, naval and air establishments but to all related activities of national defense, that jury should examine documents, and also consider testimony of witnesses as to their content and significance, and which described purpose and use to which information contained therein could be put were more than ample. 18 U.S.C.A. § 794(c).

31. Conspiracy ⇨48

In prosecution for conspiracy to violate Federal Espionage Act and for attempt to deliver documents to foreign agents, instruction that to prove conspiracy government had to show that defendant knowingly associated himself with conspiracy and its criminal purposes, including delivery of prohibited documents relating to national defense was not erroneous on ground that instruction related only to the attempt count and not to conspiracy count, especially where court had already charged adequately on attempt count. 18 U.S.C.A. § 794(a, c).

32. Criminal Law ⇨441

In prosecution for conspiracy to violate Federal Espionage Act, permitting jury to view four of documents without first obliterating or belittling the legend: "This material contains information affecting the national defense of the United States, within the meaning of the Espionage Laws" was not error since the legend was relevant to question whether defendant conspired to transmit information "with intent or reason to believe" that it would hurt the United States or help a foreign nation as the Act requires. 18 U.S.C.A. §§ 793, 794.

33. Criminal Law ⇨1169(5)

In prosecution for conspiracy to violate Federal Espionage Act, permitting jury to view documents without obliterating or belittling the legend: "This material contains information affecting the national defense of the United States, within the meaning of the Espionage Laws" was not prejudicial, where trial court warned jury, "Whether any given document relates to the national defense

of the United States is a question of fact for you to decide. It is not a question of how they were marked." 18 U.S.C.A. §§ 793, 794.

34. Treason ⇨13

Congress cannot dispense with two witness rule merely by giving treason another name, but an offense must incorporate all the elements of treason in order for the two witness rule to apply. U.S.C.A.Const. art. 3, § 3.

35. War and National Defense ⇨48

The two witness rule of the treason clause of the Constitution does not apply to the Espionage Act requiring only that an accused transmit information "with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation". 18 U.S.C.A. § 794; U.S.C.A. Const. art. 3, § 3.

36. Conspiracy ⇨48

In prosecution for conspiracy to violate Federal Espionage Act on indictment charging defendant with "intent and reason to believe" that documents would be used "to the injury of the United States and to the advantage of the Union of Soviet Socialist Republics", even if indictment charged more than statute required, trial court rightly instructed jury, "the government does not have to prove that the intent was both to injure the United States and to advantage the Soviet Union. The statute reads in the alternative." 18 U.S.C.A. § 794(c).

37. Conspiracy ⇨47

Defendant was not improperly convicted of conspiracy to violate Federal Espionage Act on ground that evidence failed to meet the requirements for a finding of treason because, weeks after jury verdict and just prior to sentencing, trial court implied that defendant was "a traitor to his country," since such single unemphatic remark, made long after the end of trial commendably free of inflammatory rhetoric, could not alter fundamental character of crime for which jury had convicted defendant. 18 U.S.C.A. § 794(c); U.S.C.A.Const. art. 3, § 3.

F.B.I. agents have statutory authority to make felony arrests without a warrant if the facts and circumstances known to them warrant a prudent man in believing that offense has been committed.

39. Arrest ⇨63(4)

Where the arresting F.B.I. agents knew, from their own observations and those of their fellow agents, that defendant had taken classified documents from his office after it was closed for the day, that shortly thereafter he had driven to a prearranged meeting with two Soviets in an out-of-the-way spot, and that he had conversed there with one of the Soviets for several minutes, an arrest without a warrant on charge of conspiracy to commit espionage was justified. 18 U.S.C.A. § 794(c); U.S.C.A.Const. Amend. 4.

40. Arrest ⇨63(4)

Arrest without warrant by F.B.I. agents on charge of conspiracy to commit espionage was not unwarranted on theory that because defendant had top secret clearance, no adverse conclusions could reasonably have been drawn from fact that he took classified documents home with him, where defendant's duties were confined to processing and filing such information and his job did not require him to study classified information at his leisure. 18 U.S.C.A. § 794(c); U.S.C.A.Const. Amend. 4.

41. Arrest ⇨63(4)

The arrest of defendant on charge of conspiracy to commit espionage was not unlawful on ground that F.B.I. agents lost sight of defendant for about two and one-half hours after he took classified documents on theory that no connection could reasonably have been drawn between that occurrence and his prearranged meeting with foreign agents since evidence required to establish guilt is not necessary for a lawful arrest without a warrant. 18 U.S.C.A. § 794(c); U.S.C.A.Const. Amend. 4.

42. Arrest ⇨63(4)

Arrest of defendant for conspiracy to commit espionage was not unwarrant-

arrest were lacking because defendant and foreign agents were merely conversing and no documents had passed between them since defendant was arrested for conspiracy to commit espionage and not for the substantive offense. 18 U.S.C.A. § 794(c); U.S.C.A.Const. Amend. 4.

43. Arrest ⇨63(1)

Arrest by F.B.I. agents of defendant on charge of conspiracy to commit espionage was not unlawful because of alleged illegality of search of defendant's automobile where agents found classified documents on theory that it was the success of that search which caused F. B.I. agents to put defendant under close surveillance, where it appeared that even without allegedly unlawful search the agents would have intensified their watch on defendant's office as well as on defendant and his coconspirators until evening of his arrest. 18 U.S.C.A. § 794(c); U.S.C.A.Const. Amend. 4.

John S. Martin, Jr., Asst. U. S. Atty. (Robert M. Morgenthau, U. S. Atty., Andrew T. McEvoy, Jr., Vincent L. Broderick, Asst. U. S. Attys.), for appellee.

Orison S. Marden, New York City, (Anthony F. Marra, Charles Nelson Brower, P. B. Konrad Knake, Jr., New York City), for appellant.

Before LUMBARD, Chief Judge, and WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN, HAYS and ANDERSON, Circuit Judges.

KAUFMAN, Circuit Judge.

[1] On this appeal, which raises multiple challenges to the conviction of Nelson Cornelious Drummond for conspiracy to violate the Federal Espionage Act, we are called upon to decide whether the trial court wrongly admitted into evidence inculpatory statements made by the defendant during periods prior to and following his arraignment in which he was allegedly denied the assistance of counsel and thus deprived of rights secured to him under the Sixth Amendment to the Con-

stitution. Because this appeal raises vital questions of judicial administration of the criminal law requiring interpretation of *Escobedo v. State of Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), and *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), we directed consideration *in banc*.

Count 1 of the indictment charged Drummond with conspiracy to deliver national defense documents to four named agents of the Soviet Union in violation of the Federal Espionage Act, 18 U.S.C. § 794(c). Count 2 charged an attempt to deliver such documents to the agents in violation of 18 U.S.C. § 794(a). Drummond's first trial ended in a mistrial when the jury was unable to reach a verdict on either count. In his second trial, the jury found Drummond guilty of the conspiracy charge of Count 1 but was unable to reach a verdict on Count 2. District Judge Murphy sentenced Drummond to life imprisonment.

Subsequent to his conviction, Drummond moved for a new trial under Fed. R.Crim.P. 33 on grounds that newly discovered evidence showed his arrest to have been in violation of the Fourth Amendment to the Constitution, and that items seized on arrest and inculpatory statements made after arrest were therefore "tainted" and inadmissible at trial. Judge Murphy denied the motion.

In addition to the asserted denial of counsel, Drummond's appeal from his conviction raises two other grounds for reversal: (1) the jury was erroneously charged with respect to the question of whether the conspiracy pertained to documents "relating to national defense"; and (2) the trial court failed to charge the jury that the requirements for a finding of treason, as set forth in Article III, Section 3 of the United States Constitution, must be met in a case of this kind,

and the evidence failed to meet such requirements.

Drummond's appeal from the judgment of conviction and the District Court's denial of the motion for a new trial are consolidated here. We have examined the record in this espionage case resulting in a life sentence with extraordinary care. We affirm Drummond's conviction and the District Court's denial of the motion for a new trial. We conclude that the inculpatory statements in this case were properly received in evidence. We find no merit in Drummond's other challenges to the trial court's evidentiary ruling and charge.

I. THE EVIDENCE

The record describes a tawdry scheme of espionage for hire. Over a period of five years, from 1957 to 1962, while on duty with the U. S. Navy in Europe and the continental United States, Drummond passed classified military materials to Soviet agents in return for payments totaling \$24,000. The scenario is replete with the cliches of international intrigue: furtive meetings, night chases, secret surveillance, spy props.¹

The evidence crucial to Drummond's conviction was largely derived from his own admissions following arrest and preceding trial. In late 1957, Drummond was approached by a Soviet agent while on duty with the United States Navy in London. At the time Drummond was heavily in debt, and the agent exploited his knowledge of Drummond's financial difficulties to enlist him as a spy for the Soviet Union. Drummond first procured a Navy identification card for the Soviet agent and was paid 250 pounds. Once committed, Drummond regularly supplied various Soviet contacts with classified documents from the files of the Eastern Atlantic and Mediterranean Headquarters of the United States Navy in Lon-

on the first Saturday of the month following his arrival in the United States, wearing a horseshoe cuff link in his button hole, and walking south on 7th Avenue until someone asked him directions to the Savoy Ballroom.

don. On one occasion, plagued by debt, he actively sought out his contacts at the U. S. S. R. Embassy and was severely reprimanded by a Soviet agent.

In the spring of 1958, Drummond was investigated by the office of U. S. Naval Intelligence, but, forewarned by his Russian contacts, he halted his espionage activities temporarily and escaped detection. Shortly thereafter he was reassigned to the United States. Establishing contact with the United States branch of the Soviet espionage network, Drummond continued passing classified documents for the next four years. His intermediary was one Esther Katz, whom he telephoned when he wished to contact the Soviet agents. He met regularly at prearranged rendezvous points in the metropolitan New York area with three Soviet agents attached to the Soviet Mission to the United Nations, Mikhail Stepanovich Savelev, Vadim Vladimirovich Sorokin, and Evgeni Mikhailovich Prokhorov (each known to Drummond only as "Mike"), who supplied him with special tools of the espionage trade: hollowed-out magnets, miniature cameras, flash paper, invisible writing materials.

During this period Drummond regularly removed and sold to the Soviets documents from the classified files of the U. S. S. Caperton, under repair in the Boston Navy Yard, and, after May 1960, from Mobile Electronics Technical Unit Number 8, located at Newport, Rhode Island, to which he was assigned as a Yeoman First Class, processing and filing classified documents including those designated "COSMIC Top Secret."²

Living beyond his legitimate earnings, Drummond received payments averaging \$500 for each delivery of classified documents, which he used to repay heavy personal debts. In November 1961, on de-

mand, he received a special payment of \$6,000 from his Soviet contact with which he purchased a bar and grill in Newport, Rhode Island. He received a second special payment of \$4,000 in August 1962. On several occasions, Drummond openly sought out his Russian contacts at their United Nations offices. As in London, he was reproached for his recklessness.

The F. B. I. began surveillance of Drummond on August 13, 1962. That day, an F. B. I. agent observed him driving toward New York City on the New York Thruway and later entering an apartment building on Central Park West. On September 7 and 8, Drummond was observed travelling between the Newport Naval Base and New York City. On September 8, an F. B. I. agent photographed one of the Soviet agents in the same apartment building. Between September 6 and 9, F. B. I. agents searched Drummond's office at Newport and found four classified documents missing. On September 9, the agents searched Drummond's car and discovered eleven classified documents, including the missing four. Based on these observations, the F. B. I. obtained an arrest warrant charging Drummond with conspiracy to commit espionage.

On September 28, 1962, after close of the workday, two F. B. I. agents monitoring Drummond's office through a closed-circuit television device and one agent hiding behind a bookcase in the office observed Drummond removing papers from a classified file and placing them in his carrying case. He then entered his car and drove on the Connecticut Turnpike and Boston Post Road to a diner in Larchmont, New York, where he was met by Soviet agent Prokhorov and another member of the Soviet Mission to the

1. By way of example: In May 1958, on instructions from a Soviet agent in Europe, Drummond was directed to make contact with Soviet agents in the United States by appearing at 125th Street and 7th Avenue in New York City at 9 p.m.

2. The designation COSMIC is classified and defined as follows: "COSMIC—The word COSMIC is a marking which when applied to a document signifies (a) that the document is the property of NATO and may not be passed outside the organization except by the originator or with his consent * * * (b) that the document is subject to the special security

protection outlined in * * * [highly classified] procedures.

"The marking COSMIC will be applied to all copies of TOP SECRET documents prepared for circulation within NATO. The marking COSMIC will not be applied to documents graded lower than TOP SECRET." OPNAV Instructions—05510.46 alpha.

United Nations. After observing the three men converse for a few minutes, F. B. I. agents on the scene placed Drummond under arrest. A search of his car incident to the arrest disclosed a loaded pistol and a number of classified national defense documents, including manuals for installation and maintenance of anti-submarine guided missiles, electric bomb fuses, and aircraft bombs. A list identifying the various documents was found on Prokhorov. Experts at trial testified that these documents could be used by hostile governments to develop counter measures which might neutralize American weapons systems or even redirect their courses to destroy United States installations. Information contained in the documents could also be utilized to modify an enemy's electronic equipment so it could operate beyond the range of American detection instruments.

Drummond took the witness stand in his own defense and admitted many of the meetings with the Soviet agents. He acknowledged the delivery of various defense documents to Soviet agents in return for more than \$20,000, but insisted that none of the documents contained information known to him to be classified, claiming instead that he believed they had actually been declassified without the change being noted on the papers. He denied that he had removed from Navy files the documents found in his car by the F. B. I. the night of his arrest. He admitted removing other documents from Navy files earlier that evening but contended that he planned to use them to lure Soviet agents into his car in order to murder them.

The guilty verdict on the conspiracy count demonstrates that the jury rejected the incredible concoction that the documents delivered over a period of more than four years were of no value to the Soviets, and that the Russians were duped by Drummond's machinations. Rather, as Judge Murphy stated in denying appellant's motion for a new trial, "more competent proof of a conspiracy would be difficult to imagine."

Drummond's main contention on this appeal is that his inculpatory statements made following arrest and preceding trial should not have been admitted into evidence because they were made at a time when he was deprived of the aid of counsel. He argues, therefore, that these admissions were obtained in violation of his Sixth Amendment constitutional right to counsel as interpreted by the Supreme Court in *Escobedo v. State of Illinois* and *Massiah v. United States*.

We note first that the testimony concerning these admissions was received in evidence without objection at the time of its introduction. Not until both prosecution and defense had rested their cases did Drummond's counsel move to strike the evidence on the ground the admissions were involuntary, citing the absence of counsel as a factor on the issue of voluntariness. No claim was made that Drummond had been denied a constitutional right of access to counsel at the time of the questioning.

Had Drummond's trial occurred subsequent to the Supreme Court decisions in *Massiah* and *Escobedo*, supra, under principles enunciated by this Court in *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965), appellant would be precluded from raising the issue on appeal.

[2] We are persuaded, however, to consider this issue here (despite the omissions below) because we would be compelled to overturn Drummond's conviction if his critical admissions should have been excluded.

Analysis of the legal problems presented on this appeal is aided by subdivision of these admissions into four categories, related to the time and circumstances in which they were made: (1) the spontaneous admissions made immediately after his arrest during the trip to F. B. I. headquarters; (2) the pre-arraignment statements made at the F. B. I. headquarters during the early morning hours of September 29, 1962; (3) the post-arraignment interviews at the Federal House of Detention on September 29, and

in early October; and (4) the post-inducement interviews held with counsel's consent at the Federal Courthouse in December and January.

Spontaneous Admissions Immediately Following Arrest

[3] Immediately after arresting Drummond in the Larchmont Diner parking lot at 11:23 p.m. on September 28, 1962, F. B. I. agents Johnson and Manion placed him in their car and drove directly to F. B. I. headquarters located at 69th Street and Third Avenue in Manhattan. After they were in the car for approximately ten minutes, Drummond spontaneously volunteered that "the best thing" for him to do would be to "spill the beans." He suggested that the agents proceed quickly to Apartment 12-R at 400 Central Park West, in order to apprehend his Soviet contacts, and handed them a card bearing the phone number of his emergency contact, Esther Katz. No further conversation occurred in the car. He was photographed and fingerprinted at Headquarters at about 12:25 a. m. and turned over to Special Agents Palguta and Gamber, who conducted subsequent interviews.

Pre-Arraignment Interview

Agents Palguta and Gamber identified themselves to Drummond, and Palguta advised him, in accordance with established F. B. I. procedure,³ that he did not have to make any statements if he did not wish to do so, that anything he said could be used against him, and that he had a right to counsel. After informing Drummond of the grounds for his arrest, they questioned him about the naval de-

fense documents found in his car, the nature of the documents passed to the Russians, and the identity of his contacts, both Soviet and American. Without hesitation, Drummond recounted the history of his association with the Soviets. Except for minor variances in dates and places of meetings, Drummond's account of his espionage activity for almost five years closely paralleled that given in later interviews and at trial. During this interview, however, in contrast to his testimony at trial, Drummond frankly admitted that he furnished the Russians with classified documents.

[4] At no time during his first trial did Drummond claim that he requested and was denied the assistance of counsel during this interrogation. At his *second* trial, however, Drummond claimed that during this initial interview with the F. B. I. agents he asked for permission "to phone counsel and my wife or my wife and they told me I couldn't do it." "They told me", he continued, "that when I got to the courthouse at Foley Square, I would be granted the opportunity to use the phone and not to worry." Agent Palguta's detailed log of the interview, which was marked for identification and given to defense counsel at the trial, but not introduced in evidence, revealed that it was not until 3:30 a. m., five minutes before the interview at headquarters terminated, that Drummond inquired if he could call his wife. "He was told," according to Palguta's notes, "he could not call his wife at this time since it was necessary to proceed to U. S. Commissioner's office for arraignment."⁴

was, therefore, denied the opportunity to offer the log into evidence, as it undoubtedly would have done if the point had been raised. Cf. *United States v. Ladson*, 294 F.2d 535 (2d Cir. 1962); *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965). To avoid penalizing the government for failing to respond at trial to a contention which we are permitting to be raised for the first time on appeal, thus disadvantaging the government, we think it only fair and just that we exercise our power to consider the exhibit marked for identification. See *United States v. Tane*, 329 F.2d 848 (2d Cir. 1964).

3. See Hoover, Civil Liberties and Law Enforcement: The Role of the F. B. I., 37 Iowa L.Rev. 175, 182 (1952).

4. At trial, Palguta was shown the F. B. I. log of the September 29 interview (GX 67 for identification) and confirmed that the initials on it were his. This log, as well as documents pertaining to other interviews, were turned over to defense counsel pursuant to the latter's Jencks Act request. Since Drummond never contended at trial that he had been denied his constitutional right of access to counsel, the government had no reason and

Drummond was arraigned before a United States Commissioner in the United States Courthouse, Foley Square, at 4:20 a. m., September 29. Pursuant to Fed.R.Crim.P. 5(b), he was (a) formally advised of the complaint against him, (b) told that he was not required to make any statement, (c) advised that any statement made by him might be used against him, and (d) advised that he had a right to counsel and a preliminary examination. Bail was fixed at \$100,000, further proceedings were postponed, and, in default of bail, Drummond was taken to the Federal House of Detention.

First Post-Arraignment Interview

During the afternoon of September 29, special agents Palguta and Gamber received a handwritten note from Drummond stating, "I remember her name. Please see me. Drummond. Also bring map of northern New York State. I think I can locate the camp." The note related to Esther Katz and to an incident previously disclosed to F. B. I. agents in which Drummond had sought to contact her. When the agents arrived at West Street Detention Headquarters at 7:00 p. m., Palguta promptly asked, "Drummond, do you have an attorney?" Drummond said no, adding that a lieutenant at the House of Detention had refused to let him use the telephone that morning and had told him "he would have to go through the proper authorities to put in a chit before he could use [it]." When questioned about this incident by Drummond's counsel at trial, Palguta stated that he did not interpret Drummond's remarks to mean that he had been refused permission to contact an attorney.⁵ Palguta then advised Drummond of his right to remain silent and to consult

counsel.⁶ At this time the agents handed appellant a statement purporting to incorporate in writing the information given by him the night before. Drummond was asked to examine the statement, make any corrections he desired, and to adopt it if it was correct. He read and edited the statement from 7:15 to 7:38, then signed this statement and another statement reciting that he had initiated the request to be interviewed by the Bureau's special agents at the Federal House of Detention.

The discussion at this second interview centered on Drummond's Russian and American contacts, places they met, and methods used for establishing contact among them. There was no evidence that at any time during this interview, or in any earlier or later interview, Drummond objected or showed any resentment at being questioned without the assistance of a lawyer. Indeed, the record indicates he was told by Palguta at the outset of the interview, "Drummond, any time you don't want to be interviewed you just say so and I will not come back here."

Subsequent Post-Arraignment Interviews

Similar interviews, originated at Drummond's request and lasting from one to four hours, were conducted at the Federal House of Detention on October 2, 3, and 4. The agents commenced each session by advising Drummond of his right to be silent and to consult a lawyer, and prior to each interview he was given an opportunity to communicate by telephone with his wife. Indeed, on October 2, it was Drummond's wife who called Palguta stating that Drummond wanted to see him. At no time did he resist

effect—not that he was refused an attorney, but he was probably referring to the lieutenant or whoever it was in charge of the prison and he was refused the use of the telephone." Palguta concluded, "That was not my concern at that particular time."

6. This customary F. B. I. procedure was used on each occasion Drummond was interviewed.

answering questions or signing statements without the aid of a lawyer. He willingly drew sketches of the espionage devices he had used, identified photographs of his Soviet contacts (correcting an error he had made when he was first shown the pictures at F. B. I. headquarters), and generally assisted the agents to the fullest extent. Drummond's testimony at trial unequivocally established that he "started cooperating with the F. B. I. agents from the time [he] was arrested." He utilized the intervals between interviews to recall additional details which he then volunteered to the agents, relating not only to his own espionage activities over many years, but also to activity of other Soviet agents currently operating in this country.

Post-Indictment Admissions

The indictment against Drummond was returned on October 5. Three days later, represented by retained counsel, he was arraigned in the United States District Court. Thereafter he was represented by retained or court-appointed counsel.

Approximately two months after the indictment, at the request of the Government, Drummond and his counsel, William Esbitt, a former Assistant U. S. Attorney, consented to further interviews. These were held at the Federal Courthouse on December 3, 4, and 11, 1962 and January 21, 1963. During this series of interviews Drummond was able to give the investigating agents more precise information concerning his relationship with Esther Katz and the dates and places of his exchanges with the Russian agents. At trial, Drummond stated that he was never threatened in any way during the interviews; his participation was motivated by a desire to make amends to the Government he had betrayed. "Anything you think I can do," he said at the outset of the December 3 interview, "tell me and I will do it."

The challenge made to the admissibility of information obtained in these interviews is essentially not one of absence of counsel but rather that the evidence was the tainted consequence of the al-

legory inadmissible admissions made in the earlier interviews, where counsel was not present.

III. THE GOVERNING LEGAL PRINCIPLES

The scope and nature of a criminal defendant's Sixth Amendment right to counsel currently preoccupies the attention of law enforcement officials, prosecutors, defense lawyers, judges, and scholars. How absolute is the right and at what point in the criminal process does it attach—on the street, in the squad car, in the stationhouse, before the committing magistrate, during detention, or in court? Under what circumstances, if any, can it be waived? What are the consequences of its denial?

Obviously we cannot—and, since we are constitutionally limited in our jurisdiction to deciding actual cases and controversies, we should not—attempt to decide all of these vital questions now. But the uncertainty currently plaguing police, prosecution and courts would seem to compel us, to an even greater degree than is ordinarily the case, to articulate the basic principles and policies which underlie the result reached here. The genius of the common law lies in the process of reasoned elaboration from past precedent; unless we explain our decisions of today with all the precision and exactitude at our command, today's holdings will become but simple fiat and will provide no guidelines for tomorrow's problems.

Is There a "Public Policy" Against Confessions?

[5] Primarily because our society prizes values other than convicting the guilty, it is now established law that confessions obtained under circumstances regarded as socially or morally indefensible cannot form the basis of criminal convictions. The dominant principle has been that a man should not be compelled to incriminate himself against his will, and the cases have taught us that it makes little difference whether a man's will be broken by physical brutality or more subtle psychological pressures.

5. Palguta's interview notes, introduced at trial, read as follows: "does not have an attorney; request to call an attorney this AM but lieutenant refused; lieutenant said [blank]. Advised of right, 7:05 p.m." Palguta testified, with respect to these notes, that Drummond "never told me he was refused the right of an attorney." Rather, according to Palguta, Drummond said that "the lieutenant refused to let me [blank] or something to that

[6] Hence, the privilege against compulsory self-incrimination of the Fifth Amendment and the due process clause of the Fourteenth Amendment have been repeatedly invoked to outlaw the use of confessions tainted by oppressive police behavior. More recently, we have been taught that this is not the only constitutional restriction upon the use of confessions in criminal prosecutions. Cases such as *Escobedo v. State of Illinois* have made it clear that there is a point—whether or not a prosecution has been formally commenced by indictment or arraignment—when the Sixth Amendment right attaches and an accused is entitled to the assistance of counsel. If counsel is denied after that point has been reached, confessions subsequently obtained must be excluded if the right to counsel is to be given meaning and respect.

[7, 8] But the fact that the use of confessions must necessarily be restricted in particular instances hardly evidences a “public policy” against the use of confessions *per se*. Indeed, there can be no sound public policy requiring law enforcement and prosecutory agencies affirmatively to prevent or deter individuals from confessing that they have engaged in unlawful conduct. Nor can there be any moral imperative that would compel society to guarantee that an accused can never voluntarily contribute to his own conviction, or indeed, that innocent suspects can never exculpate themselves promptly.⁷ Neither the privilege against self-incrimination nor the right to counsel was designed affirmatively to encourage sealed lips. They were intended, at least in part, to protect the innocent (as well as the guilty) from immoral and unethical methods, incompatible with humane law enforcement, which act as stimuli for confessions.

In this regard, the Supreme Court of California has unanimously and pointedly noted that *Escobedo* and its progeny were aimed at restraining law enforce-

ment officers “from the use of inquisitorial techniques in seeking to prove the charge against the accused out of his own mouth. They were never intended to discourage a defendant from volunteering to the police his complicity in the perpetration of a crime nor to prohibit the police from receiving and acting upon such confessions.” *People v. Cotter*, Cal., 46 Cal.Rptr. 622, 405 P.2d 862 (1965).

[9] Confessions are not suspect *per se*; it cannot be said that an individual who confesses has by that deed alone acted unreasonably or under compulsion. Our experience leads us to believe that often the conscience of an accused prods him to confess. Alternatively, expectation that independent investigation will lead to evidence sealing a conviction or calculation of a *quid pro quo* in the form of a lenient sentence, can motivate a course of full disclosure. Frequently, in the case of a reasonably intelligent man like Drummond, previous exposure to society’s religious, ethical and moral values conditions a cooperative response to a confrontation with authority. See Gaylin, *Psychiatry and the Law*, 8 Columbia University Forum, 23, 25 (Spring, 1965). Prof. Kamisar has stated this concept thus: “damaging admissions are also the product of conscience, remorse, even calculation.” Kamisar, in *Magna Carta Essays*; *Criminal Justice in Our Time*, 1, 10 (U. of Va. Press 1965).

[10] The point to bear in mind is this: the social policies underlying the privilege against self-incrimination and the right to counsel have, at times, required that certain confessions be held inadmissible in particular criminal trials. But this by no means requires that all confessions—with or without counsel—must necessarily be excluded under any and all circumstances, or even that all admissions of an accused be regarded as somehow “suspicious” or unworthy of belief.

New York’s “Stop and Frisk” Law, 33 Fordham L.Rev. 211 (1964).

The Scope of the Right to Counsel

[11] This Court does not view, as Drummond would have us, the absence of counsel at the time admissions are made as inevitably compelling a finding of inadmissibility.⁸ We are unaware of any judicial or legislative mandate compelling so extreme a rule. See *Long v. United States*, 119 U.S.App.D.C. 209, 338 F.2d 549 (1964). Recent holdings by other courts of appeals, concededly extending the exclusionary rule with respect to voluntary pre-trial utterances by criminal defendants, do not stamp as inadmissible all statements made by an uncounseled person in custody. *Jackson v. United States*, 119 U.S.App.D.C. 100, 337 F.2d 136, 141 (1964) (Burger, J., concurring), cert. denied, 380 U.S. 935, 85 S.Ct. 944, 13 L.Ed.2d 822 (1965). See also *Otney v. United States*, 340 F.2d 696, 703 (10th Cir. 1965).

And, in its very recent decision in *People v. Price*, 46 Cal.Rptr. 775, 406 P.2d 55 (1965), the Supreme Court of California explained its earlier ruling in *People v. Dorado*, 62 A.C. 350, 42 Cal.Rptr. 169, 398 P.2d 361, barring the defendant’s confession because among other things he had not been effectively informed of his right to counsel or to remain silent and had not waived these rights. “[D]enials of due process in *Massiah*, *Escobedo* and *Dorado* are not based on the fact that counsel was not present at the time the suspect made incriminating statements, but on a combination of circumstances, one of which was the absence of counsel,” 46 Cal.Rptr. 775, 780, 406 P.2d 55, 60. The Court then interpreted its holding in *Dorado* and that of the Supreme Court in *Massiah* and *Escobedo* thus: “It is apparent from the foregoing that the basis for the prohibition against the use of incriminating statements is police action which

8. “It is one thing to say: this defendant’s confession was illegally coerced because he was illiterate, unadvised of his rights, held incommunicado, subjected to threats, beaten, or whatever. It is quite another to say: no person who is arrested may be questioned by the police until he has

results in a violation of one’s constitutional rights guaranteed by ‘due process.’” 46 Cal.Rptr. 775, 781, 406 P.2d 55, 61. Our own rulings in *United States v. Cone*, 354 F.2d 119 (2d Cir. 1965), and *United States v. Robinson*, 354 F.2d 109 (2d Cir. 1965), made clear that the exclusionary rule urged by appellant would be unwise and is not compelled by *Escobedo* and *Massiah*. We decline to adopt it.

[12] We can see no reason rising to constitutional proportions requiring a *per se* rule barring the police from a reasonable period of privacy with a reasonably intelligent man who has just been placed under arrest and advised of his rights to remain silent and to counsel. The “compelling necessity” of preliminary screening interrogation “has been judicially recognized as sufficient justification, even in a society which, like ours, stands strongly and constitutionally committed to the principle that persons accused of crime cannot be made to convict themselves out of their own mouths.” *Culombe v. Connecticut*, 367 U.S. 568, 571, 81 S.Ct. 1860, 1862, 6 L.Ed.2d 1037 (1961) (Frankfurter, J.).

[13, 14] In *United States v. Middleton*, 344 F.2d 78 (2d Cir. 1965), we acknowledged the need for a reasonable delay in which the police can check out stories of the accused and run down leads before presenting the accused to the committing magistrate. Such delays can protect the innocent as well as help to convict the guilty. We held in *Robinson* that the police may conduct brief preliminary screening of an accused without counsel present. It is the “sum total of the circumstances * * * during the time [the accused] was without counsel,” *Crooker v. State of California*, 357 U.S. 433, 440, 78 S.Ct. 1287, 1292, 2 L.Ed.2d 1448 (1958), which determines whether

been advised of his right to remain silent and to have the assistance of a lawyer and until he has had the chance to see a lawyer if he wants to.” Packer, *Policing the Police: Nine Men Are Not Enough*, New Republic, Sept. 4, 1965, p. 18.

7. See generally Devlin, *The Criminal Prosecution in England* (1958). Cf. Ronayne, *The Right to Investigate and*

there has been a fundamental deprivation of rights.⁹ The coercive or noncoercive context in which the admissions were made; i. e., the spontaneity or responsive nature of the statements, the physical conditions of interrogation, the period lapsing after arrest before the statements were made, the intelligence level of the defendant, his legal sophistication, his subjective state of mind and health are all relevant to the ultimate determination. We must look behind the surface formalities; our Constitution guarantees fundamental rights, not the utterance of some judicially-ordained shibboleth. A decision based on constitutional fiat, therefore, is not a desirable method for reaching an informed resolution of the pre-trial access to counsel problem. This is precisely the sort of question that can best be answered after the investigative, experimental, and interest-balancing methods of the legislature are utilized.¹⁰

IV. APPLICATION OF GOVERNING PRINCIPLES TO THIS CASE

We proceed to decide whether Drummond's questioning was conducted in such fashion as to render inadmissible admis-

sions made in the absence of counsel. In analyzing the various factual circumstances under which Drummond was interrogated and in applying the appropriate rule of law, it will be helpful to retain the distinction between: (a) the spontaneous admissions at the time of Drummond's arrest; (b) the pre-arraignment statements; (c) the post-arraignment interviews; and (d) the post-indictment sessions.

Spontaneous Admissions

Drummond's first admissions, in the F. B. I. car on the trip from Larchmont to Bureau headquarters, were unsolicited and were volunteered in all respects by Drummond, as the previous discussion has shown. They do, however, serve to indicate his early decision to cooperate with the authorities and are of significance in assessing his state of mind during subsequent periods of interrogation. His spontaneity strongly suggests that his cooperative attitude during the next several months was rooted in a free, voluntary decision made at the time of his apprehension or even, as discussed below, pursuant to a predetermined plan.

"On first approach to these problems, one becomes aware that much of the literature is written by people whose views on these subjects are very strong and very clear and who perhaps resent any approach cluttered by complexities and uncertainties. Unfortunately, the problems of controlling crime have become agonizingly complex—as have so many problems of the world." Vorenberg, *Police Detention and Interrogation of Uncounseled Suspects*: The Supreme Court and the States, N.Y.L.J., Aug. 31, 1964, p. 4, Col. 1.

And, Professor Packer, urging legislative resolution of the problem, has written:

"Meanwhile, we can only hope that the Supreme Court will not use its carving knife in default of the legislature's scalpel to declare, for example, in the broad and unqualified terms in which its uncritical detractors and supporters mistakenly claim it has already spoken, that every person arrested for any crime must be provided with a lawyer before the police may ask him any questions." Packer, *supra* note 8, at 21.

Pre-Arraignment Statements

[15] Drummond now claims that, during the preliminary interview at F. B. I. headquarters in the early morning of September 29, he asked Agent Palguta and was refused the opportunity to call both his wife and his lawyer. This assertion was made for the first time during Drummond's testimony at his second trial after Palguta had left the stand. But Palguta's official log of the interview, which was marked for identification and given to defense counsel during the trial for his examination, discloses that a request was not made until the last five minutes of the interview and that Drummond sought permission only to call his wife, *not* a lawyer.

There was plainly no probative substance to Drummond's unsupported allegation, and we find no basis in the record for ruling otherwise. But, even if Drummond had requested to call a lawyer as well as his wife at the time indicated in Palguta's log, in the chronology of events present here there can be no finding of prejudice to Drummond. Drummond was on the verge of being taken before the U. S. Commissioner for arraignment. Earlier in the evening he had been given the standard F. B. I. warning, including advice as to his right to counsel. And, Drummond was in no way intimidated by failure to comply with his alleged request for counsel. He was a thirty-four year old man of reasonable intelligence and undoubted craftiness. He had already made elaborate disclosures to the F. B. I. of his involvement with the Soviet espionage conspiracy. We are not prepared to hold that such a request—if it occurred—could vitiating these prior disclosures, particularly where there had been initial notification of his rights, the interview had proceeded for several hours without any prior request for counsel, and arraignment was imminent. The conclusion that any request was plainly an afterthought, and that Drummond's earlier admissions were made voluntarily with full knowledge of his rights, is reinforced by his continued, almost-compulsive, willingness to coop-

erate with his interviewers over the next several days.

We held in *Robinson* that, in the circumstances of that case, the accused's rights were not violated by a preliminary stationhouse screening interview, despite failure to advise the accused of his right to remain silent or to consult counsel. But here there was a clear notification of rights before questioning began. The pre-arraignment interview lasted less than four hours; the defendant, who arrived at headquarters about 12:30 a. m., was before the Commissioner by approximately 4:30 a. m. During the interview, he was not handcuffed, and his admissions were a continuation of those begun in the car on the way to the station. There were no untoward Escobedo tactics, no disintegration of his defenses under relentless and deceptive questioning or psychological battering, no atmosphere of isolation or incommunicado detention. Moreover, we find nothing inconsistent in Drummond's desire to "spill the beans" and any wish he might have expressed to contact his wife and a lawyer. In the circumstances of this case, we hold these pre-arraignment statements admissible.

[16] The preliminary questioning of Drummond additionally was justified to expose and apprehend his co-conspirators and to gain an early assessment of the damage he had done his country's military security. In espionage cases, leads must be followed up immediately, or foreign agents, warned by their organizations' sensitive antennae, may vanish. As Chief Judge Lumbard so aptly stated in *Cone*:

"the police should not be forced unnecessarily to bear obstructions that irretrievably forfeit the opportunity of securing information under circumstances of spontaneity most favorable to truth-telling and at a time when further information may be necessary to pursue the investigation, to apprehend others, and to prevent other crimes." 354 F.2d at 126.

[17, 18] Had Drummond asked for counsel at the beginning of the inter-

9. Our recent decision in *United States v. Hall*, 348 F.2d 837 (2d Cir. 1965), provides an analogue. There, appellant was arrested pursuant to a warrant and brought to F. B. I. headquarters. Eye witnesses' identifications of Hall as the kingpin in a confidence scheme virtually ensured his conviction for interstate transportation of securities taken by fraud. We held that there was no unnecessary and unreasonable delay in arraignment Hall because of questioning designed to elicit the location of stolen bonds. "Investigation was precisely the purpose of the detention here—indeed, investigation not to obtain evidence of Hall's guilt, of which there was already an abundance, but primarily to restore to the victim what he had feloniously taken from her." 348 F.2d at 843.

10. James Vorenberg, Professor of Law at Harvard Law School, Head of the Office of Criminal Justice within the United States Department of Justice, and Reporter to the American Law Institute, has attested to the complexities of the issues involved in delineating the scope of the suspect's right to counsel:

view when he was informed of that right, or had he plainly indicated a desire not to talk before counsel arrived, and then had the agents refused him access to counsel and questioned him relentlessly, the case might be different. Certainly we are not deciding that the police may lightly disregard an accused's request to consult counsel during pre-arraignment questioning, even where the questioning is legitimately motivated. In fact, the denial of a request to call counsel during a pre-arraignment interview may, in other circumstances, render any incriminating statements inadmissible. But, here where an intelligent defendant, fully warned of his rights, nevertheless clearly evinced a strong desire to cooperate and made elaborate disclosures before his earliest request for counsel, the failure to comply with his request at that time will not void the statements.¹¹

Finally, we believe that there was a clear, knowing waiver of any right to counsel during this pre-arraignment stage of the interrogation.

[19-21] Courts indulge every reasonable presumption against the waiver of fundamental constitutional rights, but it is well established that these rights may be waived. A waiver, however, can only have validity if it represents an intentional relinquishment or abandonment of a known right or privilege. Whether there has been an intelligent waiver must be determined *ad hoc*, depending in each case upon the particular facts and circumstances surrounding the event; the court must be mindful at all times of the background, experience and general conduct of the accused alleged to have waived the right. *Johnson v. Zerbst*, 304 U.S.

458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); see *Johnson v. United States*, 318 F.2d 855 (8th Cir. 1963), cert. denied, 375 U.S. 987, 84 S.Ct. 521, 11 L.Ed.2d 474 (1964). These principles were given recognition in *Escobedo v. State of Illinois*. The Court noted that "[t]he accused may, of course, intelligently and knowingly waive his privilege against self-incrimination and his right to counsel either at a pre-trial stage or at the trial." 378 U.S. at 490 n. 14, 84 S.Ct. at 1765. See also *Jackson v. United States*, 119 U.S.App.D.C. 100, 337 F.2d 136 (1964); *Hayden v. State*, 201 N.E.2d 329 (Ind. 1964); *State v. Elam*, 263 N.C. 237, 139 S.E.2d 601, 606 (1965). It is interesting to note, moreover, that despite the holding in *United States ex rel. Russo v. State of New Jersey*, 351 F.2d 429 (3d Cir. 1965), excluding all statements made in the absence of advice as to counsel, the same court later ruled that such rights may nevertheless be waived. *Commonwealth ex rel. Craig v. Maroney*, 348 F.2d 22 (3d Cir. 1965). Judge Forman, who concurred in *Russo*, wrote:

"It is clear beyond a doubt both that Craig knew of his right to have an attorney for consultation and that he knew no statement had to be given to the police. * * * Though not express, his decision to proceed without counsel was unfettered, intelligent, and unequivocal. The * * * facts of this case * * * constitute the waiver of a right previously secured." 348 F.2d at 31.

[22, 23] While applicable legal rules do not change merely because the accused is charged with espionage, *Abel v. United States*, 362 U.S. 217, 219-220, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960), the question

ble basis for appeal. See *United States v. Torres*, 343 F.2d 750 (2d Cir. 1965); *United States v. Ladson*, 294 F.2d 535, 538-540 (2d Cir. 1962). Unlike the right to counsel contentions, where the principal judicial decisions post-date Drummond's trial, the McNabb-Mallory interpretation of Rule 5(a) was fully developed and well-known to appellant's counsel at the moment when its invocation was

of waiver cannot be divorced from the nature of the crime.¹² It is reasonable to assume that a person of Drummond's background probably had given advance consideration to the best method of extricating himself if apprehended. After being arrested in possession of classified documents in the company of Russian espionage agents, it took him but a few minutes to decide to "spill the beans." These first disclosures were not a response to persistent questioning or, indeed, to questioning of any kind. Drummond offered the information voluntarily then and, again, at his pre-arraignment interview. He initiated a number of interviews thereafter and spent the interludes between them recalling details which might aid the investigation. At the October 2 interview he produced a written plan which he had contrived purportedly to make amends for his past conduct, offering to serve as a counterespionage agent for the United States.

In sum, Drummond's decision to cooperate was not the result of an impetuous act which he later regretted or the product of any physical or mental coercion. It was the initial step in a well-conceived plan through which, it is not unreasonable to assume, he hoped to achieve judicial leniency. Drummond was fully informed of his right to counsel at every interview. To hold in these circumstances that the admissions were unconstitutionally extracted from him would be to mock the court's role in achieving a just balance between society's rights and those of the accused.

Post-Arraignment Interviews

[24, 25] We hold that Drummond also waived his right to counsel during the post-arraignment interviews in the Federal House of Detention on Septem-

ber 29 and October 2, 3 and 4, immediately preceding his indictment. Drummond initiated these interviews himself, was advised of his rights prior to each interview and after the first interview was permitted to call his wife. He was told by the interviewing agent, "Any time you don't want to be interviewed, you just say so and I will not come back here."

We are aware of Drummond's testimony that on September 29, subsequent to the pre-arraignment interview at F. B. I. headquarters but prior to the first post-arraignment interview at the Federal House of Detention, he was twice denied permission to telephone counsel. Based on this, in the main, appellant urges us not to find a waiver on the whole record before us, but to remand to the District Court for a hearing. This course would, in our opinion, be unproductive. If Drummond were able to point to some significant ambiguity in the record, the production of further evidence to clarify it might be in order. But, as appellant's able appellate counsel point out in their reply brief, the facts concerning the alleged deprivation of counsel were fully elucidated during the trial and are before us. Indeed, as we have already noted, Palguta's notes (not to be confused with Palguta's log, see note 4) relating to this interview were introduced into evidence during his cross-examination and have been considered by us on this question.¹³ The trial record amply warrants a finding that Drummond waived whatever right might theoretically have been abridged by this incident. Indeed, Drummond's conduct in proceeding enthusiastically and exhaustively to disclose to Palguta further details about his espionage activities reveals that his belated claims lack substance.¹⁴ In the light of all the evidence,

11. We have no occasion to consider Drummond's further contention on appeal that his admissions during the pre-arraignment interview should have been excluded because obtained during an unreasonable delay in arraignment contrary to the mandate of Fed.R.Crim.P. 5(a). See *Mallory v. United States*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957). The failure to object on this ground at trial

12. "Mr. Justice Jackson once observed that he would be willing to give the police greater latitude in setting up roadblocks to catch a kidnapper and protect his victim than 'to salvage a few bottles of bourbon and catch a bottlegger.'" Packer, *supra*, note 8.

13. See note 5. *supra*.

14. Although Judge Murphy made no explicit finding of a waiver when he denied defense counsel's motion at the close of the entire case to strike the testimony of Agents Mannion and Palguta concerning the interviews, as well as the written statements given by Drummond, an implicit finding of waiver can be inferred.

himself, we see no purpose in remanding for a hearing.

A finding that the statements of September 29th were inadmissible would be particularly disingenuous. It will be recalled that Drummond sought this interview to fill in some of the most important gaps of his prior disclosures to the agents; he had remembered the name of a key American contact and was anxious to reveal it. When the agents received his note requesting a meeting, and explaining what he wanted to tell them, they knew that he had repeatedly been advised of his right to consult counsel and of his privilege to stand mute—not only by the F. B. I. but by the committing magistrate at arraignment. Under these circumstances, they would have been remiss in their duties had they not met Drummond and discovered the additional information he wanted to provide. To paraphrase Justice Jackson, they were dealing with espionage, and not merely “a few bottles of bourbon.”

Even so, their first question to Drummond concerned not his American contact, but whether he had an attorney. When Drummond—even if we accept his version—explained that he had not yet been given the opportunity to consult counsel, they again informed him that he had a right to an attorney and to refuse to answer their questions. Drummond's only response was continued cooperation; he read, edited and signed a written version of his earlier disclosures and participated in the further discussions which he had sought.

[26] We are not prepared to hold that Drummond's willingness to go on “spilling the beans” was a waiver of some of his rights but not others. The Fifth and Sixth Amendments may be designed to protect quite different values but in

vide precisely the same protection which can be waived in precisely the same way. On the evening of September 29th, Drummond could have refused to talk to Agents Gamber and Palguta; he would have been protected in such a refusal by the Fifth and Sixth Amendments. But when he *did* elect to speak, his rights under both Amendments were waived. We cannot ignore Drummond's proud acknowledgment at the trial that he “started cooperating [with the government] from the time [he] was arrested,” and that he continued to cooperate “from September 28, 1962 up to and including January 21, 1963.” On the night of September 29th, Drummond freely stated in writing that he had “requested to be interviewed.” Gov't Ex. 56. And, thereafter Drummond proposed “as part of my cooperation with the government” a detailed plan pursuant to which he would serve the government as a counterespionage agent. The record of this case, in short, clearly and unmistakably creates the picture of a man who was not only willing but anxious to talk—a picture wholly at odds with the scene of station-house badgering which formed the backdrop for Escobedo. The completed mosaic is consistent with Drummond's concession at the trial, “I had told the agents that I wanted to cooperate * * * that I would be more than happy to do it if it was to benefit the United States Government.”

Nor is it material that Drummond, Gamber, Palguta and Judge Murphy may have been unaware of the existence of Danny Escobedo at the time they made their respective decisions. The crucial fact is that Drummond knew that he had a right to counsel. That he may have gained that knowledge from the F. B. I. rather than from the Supreme Court

court to * * * [formulate] a decision * * * within the power of the appellate court to formulate.” S. E. C. v. Chenery Corp., 318 U.S. 80, 88, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943); see *Fassilis v. Esperdy*, 301 F.2d 429 (2d Cir. 1962).

People v. Stewart, 62 A.C. 597, 43 Cal.Rptr. 201, 400 P.2d 97 (1965); *People v. Mathis*, 46 Cal.Rptr. 785, 406 P.2d 65 (1965).

Post-Indictment Statements

[27] The court finds that the admissions made by appellant during the December and January interviews were properly introduced at trial. These statements were elicited only after Drummond and his lawyer had conferred and given their consent to interrogation, thus vitiating any reliance on *Massiah*. The only argument appellant now urges for their inadmissibility is that they should be regarded as the tainted fruit of earlier inadmissible statements. Having held the earlier statements admissible, we obviously reject this contention.

[28] But, assuming *arguendo* that some of the earlier statements were barred, the post-indictment admissions could in no way be considered tainted. Two full months passed between the two series of interviews. Although Drummond was in jail during that interval, he consulted freely with his counsel and his wife. The alleged earlier taint could not have marred the fruitful product of Drummond's continued cooperation.

V. OTHER ISSUES RAISED BY APPELLANT

This appeal was originally argued before a panel composed of Judges Waterman, Smith, and Anderson. With respect to the remaining issues raised on this appeal, we unanimously adopt the relevant portions of the thorough draft opinion circulated by Judge Waterman, in which he disposed of the contentions substantially as follows.

Defendant attacks his conviction on two other grounds not presented below. He claims that the trial court charged the jury erroneously on the issue of whether the conspiracy pertained to documents “relating to the national defense.” He also claims that the evidence failed to meet the requirement for a finding of treason, as set forth in the Treason Clause of the United States Constitution, and that the trial court failed to charge the jury on these requirements.

[29] 18 U.S.C. § 794 forbids conspiracy to transmit information “relating to the national defense.” The government acknowledges that it was for the jury to decide whether the documents defendant conspired to transmit were of such a character. *Gorin v. United States*, 312 U.S. 19, 31-32, 61 S.Ct. 429, 85 L.Ed. 488 (1941). It seems likewise to be agreed that the jury's finding on this issue depended mainly on its assessment, in the light of the instructions given to it by the trial court, of six documents allegedly found in defendant's car at the time of his arrest.

[30] Defendant claims that the trial court defined information “relating to the national defense” only in terms of its availability to the public, and not in terms of its contents as well. On the contrary, the trial court charged the jury, “The term ‘national defense’ is a generic concept of broad connotation referring not only to military, naval and air establishments but to all related activities of national defense.” See *Gorin v. United States*, 312 U.S. 19, 28, 61 S.Ct. 429, (1941). In addition, the trial court told the jury, “in deciding this issue, you should examine the documents, and also consider the testimony of witnesses who testified as to their content and their significance and who described the purpose and the use to which the information contained therein could be put.” Such instructions were more than ample.

[31] Defendant argues that the trial court instructed the jury on this issue only in relation to the attempt count of the indictment and not in relation to the conspiracy count as well. However, the trial court did tell the jury that to prove conspiracy, the government had to show: “(2) That Drummond knowingly associated himself with the conspiracy and its criminal purposes, including the delivery of prohibited documents relating to the national defense to the Soviet Union * * *” The phrase “documents relating to the national defense” recurred at several other points in the conspiracy

See Gov't App. at 496a-501a. It is reasonable to assume that *Johnson v. Zerbst* and the long line of cases dealing with waiver were known to him. Cf. *United States v. Winfield*, 341 F.2d 70 (2d Cir. 1965). In any event, the Supreme Court long ago made clear that “[i]t would be wasteful to send a case back to a lower

instructions. Moreover, the trial court had already charged the jury adequately on this issue in relation to the attempt count, and we are satisfied that a jury of ordinary wit could have incorporated that charge by reference.

[32, 33] Defendant also contends that the trial court improperly permitted the jury to view four of the documents without first obliterating or belittling the legend which each of them bore: "This material contains information affecting the national defense of the United States, within the meaning of the Espionage Laws, Title 18, USC, Sections 793 and 794 * * *" However, it was proper to retain this legend because it was relevant to the question whether defendant conspired to transmit the information "with intent or reason to believe" that it would hurt our country or help a foreign nation, as 18 U.S.C. § 794 also requires. *Gorin v. United States*, 111 F.2d 712, 721 (9th Cir. 1940), *aff'd*, 312 U.S. 19, 61 S.Ct. 429, 85 L.Ed. 488 (1941). Moreover, to prevent the legend from prejudicing defendant's right to a jury determination on the character of the documents, the trial court warned the jury, "Whether any given document relates to the national defense of the United States is a question of fact for you to decide. It is not a question of how they were marked."

The Treason Clause

Article III, Section 3 of the United States Constitution in part provides: "Treason against the United States, shall consist only * * * in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." Defendant contends that he was, in effect, convicted of giving aid and comfort to our enemies; that the government did not prove an overt act of treason by the testimony of two witnesses; and that the trial court

erroneously failed to charge the jury on this evidentiary requirement.

[34, 35] It is true that "Congress [cannot] dispense with the two-witness rule merely by giving [treason] another name." *Cramer v. United States*, 325 U.S. 1, 45, 65 S.Ct. 918, 940, 89 L.Ed. 1441 (1945). But it is also settled that an offense must incorporate all the elements of treason in order for the two-witness rule to apply. *United States v. Rosenberg*, 195 F.2d 583, 610-611 (2d Cir.), *cert. denied*, 344 U.S. 838, 73 S.Ct. 20, 97 L.Ed. 687 (1952). The Treason Clause requires that an accused act with *intent to aid our enemies*. *Cramer v. United States*, *supra*. On the other hand, 18 U.S.C. § 794 requires only that an accused transmit information "with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation." The differences may not be very great between intent and reason to believe, or between injuring our country and aiding our adversaries. But the Supreme Court plainly regards them as sufficient to make the two-witness rule inapplicable, for in *Cramer v. United States*, *supra*, 325 U.S. at 45 and n. 53, 65 S.Ct. at 940, it cited the forerunner to 18 U.S.C. § 794 as an example of a crime affecting our national security which is not merely treason by another name. Accordingly, we find it unnecessary to consider an additional distinction urged by the government, that the Soviet Union is not an "enemy" within the meaning of the Treason Clause. See *United States v. Rosenberg*, *supra*, 195 F.2d at 610-611.¹⁵

[36] Defendant contends that, irrespective of the statutory definition of the crime for which he was prosecuted, he was actually indicted and convicted for treason. He relies on the fact that the indictment charged him with "intent and reason to believe" that the documents would be used "to the injury of the United States and to the advantage

of the Union of Soviet Socialist Republics." Even if the indictment charged more than the statute requires, a boon to which defendant can claim no right, the trial court rightly instructed the jury, "the government does not have to prove that the intent was both to injure the United States and to advantage the Soviet Union. The statute reads in the alternative." The same instruction might be given in relation to the statutory requirement of "intent or reason to believe."

[37] Defendant also relies on the fact that, weeks after the jury verdict and just prior to the sentencing, the trial court implied that he was "a traitor to his country." We fail to see how a single unemphatic remark, made long after the end of a trial commendably free of inflammatory rhetoric, could alter the fundamental character of the crime for which the jury had convicted defendant.¹⁶

Motion for New Trial

Defendant's motion for a new trial was based on allegations that his car was unlawfully searched on September 9, 1962, and that he had not discovered this fact until after his trial. Defendant contended that the fruits of the search furnished the principal basis for the arrest warrant issued on September 28, and that his arrest therefore violated the Fourth Amendment of the United States Constitution. He asserted that the documents and other items seized at the time of his arrest, and all of his subsequent incriminating statements to the F. B. I. agents, should have been excluded from evidence as the fruits of an unlawful arrest.

In denying defendant's motion for a new trial, Judge Murphy assumed that the search on September 9 was unlawful, so that there was no need for a hearing on this point. He ruled, in the alternative, that defendant's evidence was not

"newly discovered" within the meaning of Fed.R.Crim.P. 33, and that his arrest was lawful without regard to the allegedly tainted warrant. As we pointed out above in connection with defendant's right to counsel claim, we are reluctant to see a man imprisoned for life as a spy because of evidence arguably obtained in an unconstitutional manner. Consequently, we shall pass over the question of whether defendant's evidence was "newly discovered" and shall proceed directly to the merits of his claim.

[38, 39] F. B. I. agents have statutory authority to make felony arrests without a warrant "if the facts and circumstances known to [them] warrant a prudent man in believing that the offense has been committed." *Henry v. United States*, 361 U.S. 98, 102, 80 S.Ct. 168, 171, 4 L.Ed.2d 134 (1959). Here, the arresting officers knew, from their own observations and those of their fellow agents, that defendant had taken classified documents from his office after it was closed for the day; that shortly thereafter he had driven to a prearranged meeting with two Soviets in an out-of-the-way spot; and that he had conversed there with one of the Soviets for several minutes. These facts satisfied the statutory and constitutional standards for an arrest without a warrant on a charge of conspiracy to commit espionage.

[40-42] Defendant contends that because he had top secret clearance, no adverse conclusions could reasonably have been drawn from the fact that he took classified documents home with him. This might be so if defendant's job required him to study classified information at his leisure but his duties, were confined to processing and filing such information. Defendant also contends that because the F. B. I. agents lost sight of him for about two and one-half hours after he took the documents, no connec-

15. The government also argues that the evidentiary requirements of the Treason Clause were satisfied at defendant's trial.

Although this argument has some merit, there is no need to examine its validity.

16. The word "traitor" is a broad, loose and general term applied to one who, without authority, transmits information concerning the National defense—particularly

in these perilous times. It is not used to connote the technical treasonous act defined in the Constitution.

tion could reasonably have been drawn between that occurrence and his prearranged meeting with the Soviets. We disagree, having in mind the fact that for a lawful arrest without a warrant, "[e]vidence required to establish guilt is not necessary." Ibid. Defendant also argues that reasonable grounds for the arrest were lacking because defendant and the Soviets were merely conversing, no documents having passed between them. This argument ignores the fact that defendant was arrested for conspiracy to commit espionage and not for the substantive offense.

[43] Finally, defendant argues that these grounds, even if otherwise sufficient to justify an arrest without a warrant, were tainted by the alleged illegality of the search of his car on September 9, because it was the success of that search which caused the F. B. I. agents to put defendant under close surveillance. On the contrary, by September 9 the F. B. I. already had defendant, his Soviet co-conspirators, and his office under scrutiny. Moreover, the agents had learned, quite apart from the search, that defendant was visiting an apartment building in which two Soviets resided, and that four classified documents were missing from defendant's office. (They also were sufficiently suspicious of defendant to search his car.) We are satisfied that, even without the allegedly unlawful search, the F. B. I. agents would have intensified their watch on defendant's office, as well as on defendant and his co-conspirators, from September 9 up until the evening of his arrest. Therefore, their observations on that evening were obtained, not "by exploitation of that [alleged] illegality," but "by means sufficiently distinguishable to be purged of the [alleged] primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963).

1. At such a hearing the Government would surely offer Agent Palguta's log, showing that Drummond's request was made only at the end of the interview, and would call Palguta and possibly other witnesses. Agreeing with my brother Kaufman that

and to his associates, Charles Nelson Brower and P. K. Konrad Knake, Jr., who, as assigned counsel, have represented defendant, in this appeal, with skill and fidelity.

Judgment of conviction affirmed.

LUMBARD, C. J., and MOORE, FRIENDLY and HAYS, concur.

FRIENDLY, Circuit Judge (concurring):

Two of Drummond's contentions as to the use of inculpatory statements warrant additional comment.

The first is his claim that he sought to telephone his wife and his lawyer in the early morning of September 29, 1962, at the beginning of his interview at F. B. I. headquarters, and was refused permission by Agent Palguta—a request which the Government says was made only when the interview was coming to a close. As a result of the understandable lack of findings due to this having been a pre-Escobedo trial, we cannot know whether Judge Murphy rejected Drummond's testimony concerning the time of the request as unworthy of belief, as the judge would have been entitled to do even without rebutting evidence, *Dyer v. MacDougall*, 201 F.2d 265, 269 (2 Cir. 1952), or believed Drummond but considered his inculpatory statements admissible nevertheless, as almost everyone would have thought at the time. Since on the first view there would be no legal issue whereas the second raises problems of some difficulty, I would prefer to hold this appeal pending a hearing and finding by the judge on this simple point of fact, which might eliminate all legal questions and would illuminate any that remained.¹ Cf. *United States v. Santore* 290 F.2 51

in fairness we ought not to foreclose the Government from presenting such evidence before deciding to order a retrial, see fn. 4 to the court's opinion, I am not convinced that we can properly consider an exhibit that was never offered, even

1959), cert. denied, 365 U.S. 834, 81 S. Ct. 749, 5 L.Ed.2d 744 (1960).

Since a majority cannot be assembled for that course, I think that, for purposes of this appeal, I must accept Drummond's version of the facts, however unlikely it may be. So doing, I join for affirmance, for reasons similar to those expressed in my concurrence in *United States v. Cone*, 354 F.2d 129 (2 Cir. 1965). The three-hour non-coercive interrogation of Drummond at F. B. I. headquarters in the early morning of September 29 was essential to the investigation of a conspiracy placing the country's very existence in peril. It was imperative for the F. B. I. to find, and to find quickly, who were involved, what damage had been done, and what counter-measures must be taken to avert disaster. Nothing in the language or known purpose of the Assistance of Counsel clause of the Sixth Amendment suggests an intention by the founders that the police must give a man, properly arrested for such a crime, immediate access to family and counsel—with the risk that this may delay or even prevent any meaningful inquiry or alert other participants in a plot against the nation's existence. Neither, despite the statement in *Massiah v. United States*, 377 U.S. 201, 206–207, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), on the quite different subject of post-indictment interrogation, would I construe the Amendment as requiring that, at this early stage, agents of government may reject a request for access to counsel only under penalty of foregoing use of anything thereafter said by the suspect or its "fruits."

For reasons indicated in my concurrence in *United States v. Cone*, supra, I do not read the Assistance of Counsel clause of the Sixth Amendment as speaking to such a truly investigative stage at

all. The nub of Escobedo

though the failure to offer it was excusable. It would be better not to create further problems, under *Pointer v. State of Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), which a hearing before Judge Murphy could so readily avoid.

Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), is that when any legitimate investigative purpose is nominal as compared with the desire to extract an inculpatory statement, questioning to procure a confession stands no differently in the police station than before a magistrate; in order for the guarantee of the Assistance of Counsel to be truly meaningful, it must extend to a penumbral zone before the "criminal prosecution" has begun and a suspect has been formally "accused." Unless the "penumbra" extends all the way to the point of arrest, which the Court in no way held, the interests of society must be dominant at the beginning of the investigative process, just as the interests of the future "accused" prevail at the end. If the need for saving a kidnapped girl's life justified a failure to warn of the rights to remain silent and to have the assistance of counsel, as Chief Justice Traynor so rightly held in *People v. Modesto*, 42 Cal.Rptr. 417, 398 P.2d 753 (1965), protection of the nation afforded equal justification for briefly postponing Drummond's access to counsel here. Moreover, even if we assume Drummond made the request to telephone when he said he did, he did not make it clear that granting it was a condition of his willingness to talk.

The post-arraignment interview on the evening of September 29, which forms the subject of the dissents of my brothers Waterman and Anderson, stands on an entirely different legal basis. At this period Drummond had a constitutional right to the assistance of counsel, as decisions available at the time of his trial made plain. *Hamilton v. State of Alabama*, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961); *White v. State of Maryland*, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963).² Here too we would

2. Although *Hamilton* could be distinguished on the basis argued in Judge Anderson's dissent, fn. 2, *White* cannot be. The arraignment there was not "critical" since *White* was allowed to change his guilty plea; yet the Court held that what he said at that time without the assistance

be assisted by an explicit finding from the trial judge, who saw and heard the witnesses, giving his interpretation of the events. But in this instance we have more evidence—very likely all we ever can have—and, since the right to counsel after arraignment was clear at the time of trial, we can properly assume the judge was satisfied that Drummond had elected to forego it. Drummond had solicited the interview with the F. B. I. agents; when they asked him whether he had an attorney, he responded with a historical reference and proceeded to read, edit and sign the statement and to carry on further discussions with them, all despite an explicit warning of his right to consult a lawyer. If there be an ambiguity in the situation, the judge's resolution of this in the Government's favor surely was not clearly erroneous.³

WATERMAN, Circuit Judge (dissenting):

I dissent.

The defendant in the present case was tried and convicted in the summer of 1963 prior to the decisions of the United States Supreme Court in *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) and *Escobedo v. State of Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). His appeal from the conviction was pending when these cases were decided. In the spring of 1965 a division of this court, consisting of the three judges who dis-

of counsel could not be used against him. And, quite apart from the light later shed by *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), there could be no real doubt that these decisions applied to out-of-court interrogation of an arraigned prisoner by the police or the prosecutor.

3. Although a contrary argument could be constructed on the basis of the Court's listing "the police have not effectively warned him of his absolute constitutional right to remain silent," 378 U.S. at 491, 84 S.Ct. at 1765, as a critical factor, I agree with Judge Waterman that the Sixth Amendment right recognized in *Escobedo*

sent from the affirmance of the conviction, heard oral argument and agreed that, on the present record made before these two cases were decided, the teachings of *Massiah* and *Escobedo* precluded an affirmance because appellant had been deprived of rights rightfully his under the U. S. Constitution. A panel opinion, which I authored, never was operative because of the decision of the full court to consider the case in banc.

Now a majority of the full court, sitting in banc, affirm the defendant's conviction. After careful deliberation and respectful consideration of my brothers' beliefs, I have concluded that the panel result reached several months ago remains the only result that can be reconciled with the opinion of the Supreme Court in *Escobedo*. No constructive purpose would be served by appending my lengthy opinion as a dissent to the majority opinion of the court in banc. Nevertheless, it is important to restate in smaller fashion what was said several months ago on the issue of the protection afforded Drummond by the assistance of counsel clause of the Sixth Amendment during the interrogation that took place at the Federal House of Detention on the evening of September 29, 1962, and on the further issue whether Drummond's conduct during this interrogation "waived" this protection.

We of the erstwhile Drummond panel unanimously concluded then, and we continue to believe, that Drummond was

to interrogation afforded by the self-incrimination clause of the Fifth. Indeed, as to the post-arraignment questioning here at issue, *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), had already made that clear. The case he poses—of an intelligent prisoner who, after arraignment, repeatedly demands counsel but, after thorough warning, continues to answer questions—would be a difficult one; presumably the critical issue would be whether it was made clear that he had the right to consult counsel before answering rather than later. But the very statement indicates that such a case is not too likely to arise; and the judge was warranted in thinking

ing the interrogation by agents Palguta and Gamber on the evening of September 29, when he did not, in fact, enjoy that assistance. Furthermore, we recognized then, and do now, that Drummond requested permission of agents and employees of the Government to telephone a lawyer on at least three occasions, and that his requests were each time refused: first, during the initial interview in the early morning of September 29;¹ second, while he was at the Federal Courthouse later that morning awaiting his appearance before the U. S. Commissioner for his initial examination; and third, after he had been locked in the Federal House of Detention after that appearance. We also noted that when, on the evening of September 29, the F. B. I. agents were told by the defendant that he had been denied the opportunity earlier in the day to obtain counsel, they shrugged off any responsibility to assist him.² Finally, we recognized then, and we do now, that after Drummond's requests to reach counsel had been thrice denied he made several damaging admissions, and signed a written version of the inculpatory statements he had made the night before. And we went on to characterize Drummond's conduct at this juncture as "patently voluntary." We could not, however, find an easy equation between Drummond's voluntary admissions on the evening of September 29 and a waiver by him of his constitutionally protected right to counsel at that time, inasmuch as he continued to request access to counsel and his requests were repeatedly denied. We remain of the same belief.

1. The factual circumstances of Drummond's first request for counsel are unclear. Given the present posture of this case, I agree with Judge Friendly that one must accept Drummond's version of the facts relating to this request.
2. The majority pretend that Drummond did not again ask for counsel prior to the interrogation on the evening of September 29. I disagree. When asked whether he had an attorney Drummond

relates to the interrogation on the evening of September 29, is expressed in terms of waiver, but in actuality it rests on an extremely restrictive reading of the Supreme Court opinion in *Escobedo*. This restrictive approach is most clearly disclosed by Judge Kaufman's statement that "[t]he Fifth and Sixth Amendments may be designed to protect quite different values but in concrete situations they may often provide precisely the same protection * * *." I do not now deny that in some cases the protection afforded an accused by the right to counsel may be no broader than that afforded by the privilege against self-incrimination; that is, the right to keep silent. But the majority errs when they suggest that in the present case the protection conferred by the Sixth Amendment as explicated in *Escobedo* was identical with that conferred by the Fifth Amendment.

If *Escobedo* changed the law regulating the admissibility of the out-of-court inculpatory statements of an accused, the decision must mean that, at least in some instances of police interrogation, an accused has a right not to be questioned in the absence of counsel *in addition to* a right to remain silent, and that police respect for the former right is a precondition of admissibility at trial of inculpatory statements. Compare *Escobedo v. State of Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964) with *Crooker v. State of California*, 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed.2d 1448 (1958). See *Friendly The Bill of Rights as a Code of Criminal Procedure*, 53 Calif.L.Rev. 929, 949 (1965). And one such instance surely must be when the

told agents Palguta and Gamber that he had repeatedly sought an opportunity to contact counsel and each time he had been rebuffed. If Drummond assumed that the F. B. I. agents would allow him an opportunity to consult with counsel before they proceeded to interrogate him he certainly would have believed that his tale of frustration would be understood by the agents as a request for an opportunity to consult with counsel.

"Opinion:

"I believe this man has recovered from what appears to have been a contusion of the scalp with apparently some symptoms of intra-cranial discomfort, and is recovering from a contusion and what appears to have been a simple fracture of the right transverse process of the 3rd lumbar vertebra.

"I think the radiographic findings would account for the persistence of his complaints and I think in all probabilities this is the cause of moderate discomfort and possibly a little weakness in the back still, particularly if he has to do much bending and lifting. I think such symptoms possibly may persist for several months still and will partially disable him. Ultimately I believe he should make a satisfactory recovery."

This is all clearly relevant and does tend to make more understandable the basis of that part of the report designated "Physical Examination" which the appellant had already put before the jury. It enabled the latter to appraise that in the light of the circumstances under which the doctor reached his conclusions as to the physical condition of the plaintiff and to perceive the significance of those conclusions in relation to any impairment of the plaintiff's health and ability to perform reumunerative work because of the injuries he received in the collision.

Affirmed.



UNITED STATES v. HEINE.

No. 17.

Circuit Court of Appeals, Second Circuit.

Nov. 8, 1945.

1. Insurrection and sedition ⚡2

The Espionage Act implies that there are some kinds of information "relating to the national defense" which must not be given even to an ally, no matter how innocent, or even commendable, purpose of sender may be. 50 U.S.C.A. § 32.

2. Insurrection and sedition ⚡2

Under Espionage Act, it is lawful to transmit any information about weapons

and munitions of war which the services themselves made public, as well as information which services have never thought it necessary to withhold. 50 U.S.C.A. § 32.

3. Insurrection and sedition ⚡2

Under Espionage Act prohibiting dissemination of "information relating to the national defense", quoted phrase does not include information which comes from sources lawfully accessible to everybody, and hence German-born American citizen who was engaged in collecting all available information about American production of airplanes, so that Germany should be advised of American defense in event of war, could not be convicted of violating the Espionage Act. 50 U.S.C.A. §§ 32, 34.

See Words and Phrases, Permanent Edition, for all other definitions of "Information Relating to the National Defense".

4. Insurrection and sedition ⚡2

Under Espionage Act, whatever was lawful to broadcast throughout the United States was lawful to send abroad. 50 U.S.C.A. § 32.

5. Insurrection and sedition ⚡2

Accused who conveyed to Germany information which came from sources lawfully accessible to anyone in the United States could not be convicted of violating the Espionage Act because in his letters and in his talks accused misled his correspondents as to his motive in asking for information, since, whatever wrong was done to his correspondents, his motive did not make the spread of information criminal which it would not have been criminal to spread if he had got it fairly. 50 U.S.C.A. § 32.

6. Insurrection and sedition ⚡2

Accused, who conveyed to Germany information which came from sources lawfully accessible to anyone in the United States, could not be convicted of violating the Espionage Act because accused did not transmit information as he got it but compressed it into convenient form, since the act is aimed at substance of proscribed information, not at act of making it more readily available for use. 50 U.S.C.A. § 32.

7. Conspiracy ⚡47

Evidence sustained conviction of conspiracy to violate statute which makes it a crime not to register with the Secretary

of State if one is acting as an agent of a foreign government. Cr.Code § 37, 18 U.S.C.A. § 88; 22 U.S.C.A. § 233.

Appeal from District Court of the United States for the Eastern District of New York.

Edmund Carl Heine was convicted in the District Court upon an indictment in two counts; the first, charging the defendant and others (under § 88 of Title 18, U.S.C.A.), with a conspiracy to violate § 233 of Title 22, U.S.C.A.; and the second, charging them (under § 34 of Title 50, U.S.C.A.), with a conspiracy to violate § 32 of Title 50, U.S.C.A., and he appeals.

Affirmed in part and reversed in part.

George Gordon Battle, of New York City, for appellant.

Vine H. Smith, of Brooklyn, N. Y., for the appellee.

Before L. HAND, CHASE, and FRANK, Circuit Judges.

L. HAND, Circuit Judge.

Heine was indicted with thirty-two other defendants, under an indictment in two counts. The first count (under § 88 of Title 18, U.S.C.A.), was for a conspiracy to violate § 233 of Title 22, U.S.C.A.: which makes it a crime not to register with the Secretary of State, if one is acting as an agent for a foreign government. The second count under § 34 of Title 50, U.S.C.A., was for a conspiracy to violate § 32 of that title, the relevant language of which is set forth in the margin.* The most important point raised upon this appeal, and the only one which we find it necessary to discuss, is the sufficiency of the evidence to sustain a verdict. We will consider the two counts in inverse order, for the second is much the more important; especially as the defendant has already served the term for which he was sentenced under the first.

Heine was a native-born German, fifty

years old at the time of the trial (November and December, 1941), who came to this country in June, 1914. Although he had had some business experience, his first job in the United States was as a mechanic in the Packard Motorcar Company in Detroit, where he lived with his brother. In January, 1918, he went into the employ of the Ford Motor Company, and was sent to the West Indies in 1919. Upon his return in 1920, the company sent him to South America, where he worked in Brazil, Argentine, Uruguay and other countries. He was naturalized in 1920, was married in January, 1922; and in August, 1922, returned to this country. Later he went to England, and after that to Italy, the Balkans, and Barcelona. He came back again to this country in 1925; but on January 1, 1926, he was sent to Berlin as assistant manager of the Ford assembly plant, and in August, 1928, he became a manager of the business. Late in 1930 or early in 1931, he went to Cologne to superintend a new manufacturing plant which had been built there. In 1935 he returned to Detroit, and in May of that year he left the Ford Company for good, and took a position with the Chrysler Corporation, for which he worked in Spain, Portugal and North Africa.

In 1938 and 1939 a German automobile corporation, known as the Volkswagenwerke, suggested that a position might be open to him; but this he was unwilling, however, to consider, because, as he swore, the American consul at Munich told him that he must go home, if he wished to keep his citizenship. Whatever the reason, he did return to the United States in May, 1940, with authority from the Volkswagenwerke to recover some deposits paid to local companies which they had received upon contracts that the companies had abandoned. The Volkswagenwerke also asked him to find out what he could about the automobile and aviation industries in this country. A few weeks after his return he began to send back reports about the aviation industry which constitute the

nized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years."

* "§ 32. Unlawfully disclosing information affecting national defense. Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force

gravamen of the charge against him. These he continued to send until August, 1940, and perhaps later, though not after December 7, 1941. At the direction of the Volkswagenwerke he did not send these direct, but posted them to addresses in New York and Lima, Peru, from which they were to be forwarded to Germany. The evidence permitted the jury to find that this course was surreptitiously adopted in order to escape detection.

The information which Heine collected was from various sources: ordinary magazines, books and newspapers; technical catalogues, handbooks and journals; correspondence with airplane manufacturers; consultation with one, Aldrich, who was already familiar with the industry; talks with one or two employees in airplane factories; exhibits, and talks with attendants, at the World's Fair in New York in the summer of 1940. This material he condensed and arranged in his reports, so as to disclose in compressed form the kinds and numbers of the planes—military and commercial—which were being produced and which it was proposed to produce; the location and capacity of the factories; the number of their employees; and everything else, of which he could get hold, that would contribute to as full a conspectus as possible of the airplane industry. All of this information came from sources that were lawfully accessible to anyone who was willing to take the pains to find, sift and collate it; no public authorities, naval, military or other, had ordered, or indeed suggested, that the manufacturers of airplanes—even including those made for the services—should withhold any facts which they were personally willing to give out. The question which the second count raises is whether § 32 of Title 50, U.S.C.A. covers such activities as we have described.

[1] The evidence as a whole supported a finding that Heine was engaged in collecting all available information about our production of airplanes, so that the Reich should be advised of our defense in the event of war. That would not however serve, unless § 32 would have equally condemned what he did, if he had sent his reports to a friendly power in a time of unthreatened peace. This follows from the fact that the section covers, not only information intended to be used "to the injury of the United States," but that intended to be used "to the advantage of a foreign

nation." When the bill left the House it did not have the second clause; and it does not appear at what stage it was amended by adding the alternative, which greatly enlarged its scope; for while it is true that it is somewhat hard to imagine instances in which anyone would be likely to transmit information "relating to the national defense," which would be injurious to the United States, and yet not advantageous to a foreign power, it is possible to think of many cases where information might be advantageous to another power, and yet not injurious to the United States. The section as enacted necessarily implies that there are some kinds of information "relating to the national defense" which must not be given to a friendly power, not even to an ally, no matter how innocent, or even commendable, the purpose of the sender may be. Obviously, so drastic a repression of the free exchange of information it is wise carefully to scrutinize, lest extravagant and absurd consequences result.

It seems plain that the section cannot cover information about all those activities which become tributary to "the national defense" in time of war; for in modern war there are none which do not. The amount of iron smelted, of steel forged, of parts fabricated; the number of arable acres, their average yield; engineering schools, scientific schools, medical schools, their staffs, their students, their curriculums, their laboratories; metal deposits; technical publications of all kinds; such non-technical publications as disclose the pacific or belligerent temper of the people, or their discontent with the government: every part in short of the national economy and everything tending to disclose the national mind are important in time of war, and will then "relate to the national defense." If the words mean that, it would be criminal to send to a subject of Britain or to a citizen of France a railway map, a list of merchant ships, a description of automobile assembly technique, an account of the latest discoveries in antisepsis, or in plant or animal breeding, or even a work upon modern physics, provided only the sender had reason to believe that the information might reach the government, and be helpful to it in any of its activities. Nor would this become tolerable, though we limited the phrase to what would be advantageous to those countries in their own national defense, because that is as all-embracing as

our own. Such an assertion of national isolationism is certainly not to be imputed to Congress.

[2,3] A less impossible interpretation would be to confine the clause to information about things adapted only for the national defense, and things of ambiguous use which have been already collected, or prepared, for the supply of the armed services. The first would include airplanes, cannon, small arms and munitions of war, warships, forts, and the like: the second, coal, food, clothing or other supplies accumulated for the army and navy. In that interpretation the clause would cover those military planes, though made by private companies, which Heine's reports included. Even so, there might be doubt whether the judge's charge to the jury should not have distinguished between military and commercial planes; but we need not consider that question because we think that it was lawful for him to include information about both kinds of planes. As declared in *Gorin v. United States*, 312 U.S. 19, 28, 61 S.Ct. 429, 85 L.Ed. 488, and as the judge himself charged, it is obviously lawful to transmit any information about weapons and munitions of war which the services had themselves made public; and if that be true, we can see no warrant for making a distinction between such information, and information which the services have never thought it necessary to withhold at all. There can, for example, be no rational difference between information about a factory which is turning out bombers, and to which the army allows access to all comers, and information about the same bombers, contained in an official report, or procured by a magazine through interviews with officers. The services must be trusted to determine what information may be broadcast without prejudice to the "national defense," and their consent to its dissemination is as much evidenced by what they do not seek to suppress, as by what they utter. Certainly it cannot be unlawful to spread such information within the United States; and, if so, it would be to the last degree fatuous to forbid its transmission to the citizens of a friendly foreign power. "Information relating to the national defense," whatever else it means, cannot therefore include that kind of information, and so far as Heine's reports contained it, they were not within the section.

[4-6] There is independently reason to suppose that this was the meaning which

the House at least had in mind when the bill was before it during the First War—1917. It is true that the debates on the floor of both Houses do not tell much, but at the hearings before the Judiciary Committee a number of the witnesses expressed concern at the possible suppression of information as the bill read even before its scope had been enlarged by the amendment. Possibly it was to allay these fears that the Committee, in reporting to the House, used the following words in connection with § 4 as it then was: "This section of the bill has been carefully and patiently considered by the Committee. The Committee realizes that the section as recommended gives the President broad power, but it must be admitted by all patriotic persons anxious for the success of our armies in times like these through which we are now going, it is important that the Commander-in-Chief shall have authority to prevent the publication of national defense secrets which would be useful to the enemy, and, therefore, harmful to the United States." Section 4, about which this language was used, gave the President power to declare a national emergency, and to "prohibit the publication or communication of * * * any information relating to the national defense which in his judgment is of such a character that it is, or might be, useful to the enemy." It is most unlikely that the words in § 4 had a meaning different from the same words then in § 2 of the bill, and now in § 32 of Title 50. At least the Judiciary Committee of the House supposed that the act was directed at "secrets." It is not necessary for us to go so far; and in any event "secrets" is an equivocal word whose definition might prove treacherous. It is enough in the case at bar to hold, as we do, that whatever it was lawful to broadcast throughout the country it was lawful to send abroad; and that it was lawful to prepare and publish domestically all that Heine put in his reports. We do not forget that there was evidence that in his letters and in his talks he misled his correspondents as to his motive in asking for information; but that is not relevant to the second count. Whatever the wrong done to his correspondents, that motive did not make the spread of information criminal, which it would not have been criminal to spread, if he had got it fairly. Nor did it make a difference that Heine did not transmit to the Volkswagenwerke the information as he got it;

was not impossible. France had fallen; Russia was apparently neutral, and had overrun part of Poland in conjunction with Germany; Britain stood alone, with every prospect of herself going down. We were already embarked upon our belated preparation, and that could be directed only against the Reich. If a jury was not permitted in such a setting to infer that the collection and transmission of such information by such means as Heine employed, was for the Reich, and not for the Volkswagenwerke, there is an end to circumstantial proof. Nobody but a simpleton could fail to detect the hall-marks of the principal in whose interest the whole web of chicane and evasion had been woven.

Conviction on the first count affirmed.
Conviction on the second count reversed.



BOWLES, Price Administrator, v. SKAGGS.
No. 10018.

Circuit Court of Appeals, Sixth Circuit.
Nov. 12, 1945.

1. War ☞4

Where District Court declined to require administrator of deceased's estate to refund to purchaser the amount of overcharge exacted in sale of a used refrigerator, supplementary order of Price Administrator, issued subsequent to the sale, excepting from price regulations sales made under court order by judicial officer, did not control the appeal from denial of the mandatory order, or relieve administrator of the estate from the application of any remedy permissible for such violation. Emergency Price Control Act of 1942, §§ 4, 205(a, e), 50 U.S.C.A. Appendix § 904, 925(a, e).

2. Equity ☞423

Equity courts have the power to mould their remedies to the needs of particular situations.

3. Injunction ☞4, 5, 194

Although injunctions are most commonly prohibitory and operate in futuro, equity courts may, when equitable considerations have required the restoration of a

nothing to the contrary of what we are holding. It is true that the court (312 U.S. 28, 61 S.Ct. 434) there accepted the following definition of the phrase, "relating to the national defense" taken from the prosecution's brief: "a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." The words, "related activities of national preparedness," do indeed create a penumbra of some uncertainty; but it cannot comprise such information as is here in question, as appears from what immediately preceded the language we have quoted: "Where there is no occasion for secrecy, as with reports relating to national defense, published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government." Obviously, this could not mean that it may not be to the advantage of a foreign government to have possession of such information; it can only mean that, when the information has once been made public, and has thus become available in one way or another to any foreign government, the "advantage" intended by the section cannot reside in facilitating its use by condensing and arranging it.

[7] As to the first count, in spite of the absence of any direct evidence showing the connection of the Volkswagenwerke with the Reich, there was ample in Heine's history and conduct to support a verdict based upon the finding that he was acting as an agent for the Reich, and the jury was of course not bound to accept his own explanation. The Volkswagenwerke had never made airplanes; and, so far as appears, they did not propose to make military planes anyway. Why should they wish accounts of the industry in this country as complete as possible? What good would it do them to learn the amount of our production, all of which at the time was for our own use? Moreover, although it is true that in the summer of 1940, war was not imminent, everyone knew that it

more erroneous since the making of the motion by plaintiff compelled defendant to examine plaintiff's affidavit requesting disqualification in order to ascertain whether it was sufficient as a matter of law.⁶ In denying the application defendant had the right, if not the duty, to set forth his reasons for the denial. Jurisdiction being clear on the face of the complaint, the defense of immunity is valid.⁷

[7] Even if plaintiff be correct and defendant lacked jurisdiction over the subject-matter when he made the challenged statement, plaintiff would still find himself between Scylla and Charybdis, since defendant would be acting individually and not within the scope of his duties. Under this hypothesis defendant would no longer be acting in a governmental capacity and hence his individual conduct would not constitute a violation of the Fifth Amendment. This was demonstrated in the case of *Bell v. Hood*, D.C.Cal.1947, 71 F.Supp. 813, upon remand from the Supreme Court where recovery was sought against certain Federal Bureau of Investigation agents for invasion of plaintiff's constitutional rights. In denying recovery, Judge Mathes said (at page 817):

"* * * The defendants are sought to be held as individuals, not as federal officers. But inasmuch as the prohibitions of the Fourth and Fifth Amendments do not apply to individual conduct, the Amendments themselves, when violated, cannot be

5. Complaint, paragraph 7.

6. *Eisler v. United States*, 1948, 83 U.S. App.D.C. 315, 170 F.2d 273; *United States v. Lattimore*, D.C.D.C.1954, 125 F.Supp. 295; *Green v. Murphy*, 3 Cir., 1958, 259 F.2d 591.

7. Similarly, the oral statement of defendant that he believed that the Court of Appeals had rebuked plaintiff was made after plaintiff rose in open court and advanced a construction of that opinion which was regarded as improper. There is no authority which requires a judge

against individuals."

The defense of judicial immunity being clear and no federally protected right having been invaded, the motion to dismiss the complaint must be granted.



UNITED STATES of America,
Plaintiff,

v.

Igor Y. MELEKH, also known as Peter Stephens and also known as "Gipsy," and Willie Hirsch, also known as John Gilmore, Defendants.

No. 60 Cr. 529.

United States District Court
N. D. Illinois, E. D.
March 20, 1961.

Prosecution for conspiracy to obtain defense information and to induce a United States citizen to act illegally as a foreign agent and for other offenses. On designated motions by the defendants the District Court, Robson, J., held, *inter alia*, that a count of the indictment charging, in the language of the statute, conspiracy to obtain defense information was not fatally defective for failure to

to remain mute when, in his view, an improper interpretation of a legal opinion is made on oral argument. That the statement was irrelevant to the merits of the motion is immaterial (see *Karelas v. Baldwin*, 1932, 237 App.Div. 265, 261 N.Y.S. 518) and is not the equivalent to the absence of jurisdiction for the statement. If this were not so, any statement made by a court by way of *obiter dictum* would be outside the area of privilege and would result in the evils which the rule of *Bradley v. Fisher*, *supra*, intended to prevent.

was guarded or secret.

Order in accordance with opinion.

See, also, 190 F.Supp. 67.

1. Conspiracy $\S$ 43(6)

It is not necessary to allege with technical precision all elements essential to commission of offense which is object of conspiracy or to state such object with detail which would be required in indictment for committing substantive offense. 18 U.S.C.A. $\S$ 371.

2. Indictment and Information $\S$ 110(10)

Count of indictment charging, in language of statute, conspiracy to violate statute to obtain defense information was not fatally defective for failure to allege that information concerned was guarded or secret but count was sufficient. 18 U.S.C.A. $\S\S$ 371, 793.

3. International Law $\S$ 10.24

There is no inconsistency between statute making it criminal offense for one to act as agent of foreign government without prior notification of Secretary of State and statute making it criminal offense for a person becoming agent of foreign principal to fail to register with Attorney General. 18 U.S.C.A. $\S$ 951; Foreign Agents Registration Act of 1938, $\S\S$ 1-11, 2(a), 22 U.S.C.A. $\S\S$ 611-621, 612(a).

4. International Law $\S$ 10.24

Statute requiring agent of foreign principal to register within 10 days after becoming such agent means not later than 10 days after becoming such agent and imposes no prohibition against earlier registration. Foreign Agents Registration Act of 1938, $\S$ 2, 22 U.S.C.A. $\S$ 612.

5. Constitutional Law $\S$ 42

One able to make timely registration with noncriminal consequences but failing to make required registration at any time is in no position to challenge constitutionality of registration statute. Foreign Agents Registration Act of 1938, $\S$ 2, 22 U.S.C.A. $\S$ 612; 18 U.S.C.A. $\S$ 591.

Statute requiring prior notification to Secretary of State before acting as agent for foreign government contemplates no future criminal activity and is not unconstitutional because incidentally it might be applicable to one about to be criminally engaged. 18 U.S.C.A. $\S$ 591.

7. International Law $\S$ 10.46

Statute exempting United Nations employees from requirements of registration as foreign agents does not render a United Nations employee immune from prosecution for conspiring with and aiding persons not exempt who violate registration provisions. International Organizations Immunities Act, $\S$ 7(a), 22 U.S.C.A. $\S$ 288d(a).

8. Criminal Law $\S$ 59(5)

One can be guilty as aider and abettor though incapable of committing principal crime.

9. Conspiracy $\S$ 43(6)

Count of indictment charging that defendants conspired to induce United States citizen to act as agent of foreign government without prior notification of Secretary of State adequately alleged that citizen concerned knew of his role as foreign agent. 18 U.S.C.A. $\S\S$ 371, 951.

10. Criminal Law $\S$ 113

Proper venue for prosecution for conspiring to induce citizen to act as foreign agent without prior notification of Secretary of State and aiding and abetting him was in district where conspiracy and aiding and abetting were alleged to have occurred rather than in District of Columbia where any registration would take place. 18 U.S.C.A. $\S\S$ 371, 951.

11. Indictment and Information $\S$ 121(2)

Defendants' motions for bill of particulars filed in prosecution for conspiracy to obtain defense information, conspiracy to induce United States citizen to act as foreign agent and for other stated offenses would be denied to the extent that they requested minutiae of evidence but would be granted to the extent that

States citizen. 18 U.S.C.A. §§ 2, 371, 791 et seq., 793, 951.

12. Indictment and Information

◊81(5), 139

Pre-trial motion, in conspiracy prosecution, to have defendants' asserted aliases stricken from caption and body of indictment on theory that they would put defendants in opprobrious light was premature but if government proved that aliases were integral part of conspiracy, defendants had no just cause for complaint. 18 U.S.C.A. § 371.

13. Criminal Law ◊627½

Defendant charged with conspiracy to obtain defense information and to induce a United States citizen to act illegally as a foreign agent and acting illegally as a foreign agent made insufficient showing to warrant disclosure of grand jury minutes. 18 U.S.C.A. §§ 2, 371, 791 et seq., 793, 951.

14. Courts ◊518

Soviet citizen employed by United Nations as chief of its Russian language section, traveling on diplomatic passport, but not accredited to United States or accepted by it was not a "public minister" within meaning of constitutional and statutory provisions placing exclusive jurisdiction of causes concerning such in the United States Supreme Court. 28 U.S.C.A. § 1251; U.S.C.A.Const. art. 3, § 2, cl. 2.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Minister".

15. Courts ◊518

"Public minister" as used in constitutional and statutory provisions placing exclusive jurisdiction of causes concerning such in United States Supreme Court has inherent within it the thought of representation. 28 U.S.C.A. § 1251; U.S.C.A.Const. art. 3, § 2, cl. 2.

16. International Law ◊10.46

United Nations Charter provision granting United Nations officials privileges and immunities necessary for independent exercise of their functions in

only functional immunity and did not clothe United Nations employee with immunity from prosecution for conspiracy to obtain defense information, and to induce a United States citizen to act illegally as a foreign agent. 18 U.S.C.A. §§ 2, 371, 791 et seq., 793, 951; Headquarters Agreement of the United Nations, § 11, 61 Stat. 758; Immigration and Nationality Act, § 101(a) (15) (C); U.S.C.A. § 1101(a) (15) (C); U.S.C.A. Const. art. 2, § 3.

17. Indictment and Information ◊173

Indictment is not subject to attack of variance where it is disclosed by evidence that grand jury knew name of co-conspirator but failed to state it.

Robert Tieken, U. S. Atty., Chicago, Ill., Harold Ungar, Washington, D. C., for the United States.

Donald Page Moore, Chicago, Ill., Edward Bennett Williams, Washington, D. C., for defendant Melekh.

Pearl M. Hart, Chicago, Ill., for defendant Hirsch.

ROBSON, District Judge.

Each of the defendants has filed several motions attacking the validity of the indictment, the jurisdiction of the Court, and for discovery. The indictment, in three counts, alleges in Count One, a conspiracy by defendants Melekh and Hirsch with one Doronkin, to violate 18 U.S.C. § 793(a), (b), and (c), to obtain information respecting the national defense, particularly referring to military installations in Chicago and Cook County, including aerial photographs, with the intent that the material be transmitted to a foreign Government, the Union of Soviet Socialist Republics (hereinafter termed U.S.S.R.) for its advantage, in violation of 18 U.S.C. Chap. 37.

It is also charged that they would as part of the conspiracy induce a United States citizen to procure the information; that Melekh would supervise and

employ persons to obtain and transmit said information, and would activate agents for the doing of the work; that he would use the names of Peter Stephens and the pseudonym, Gipsy; and that he would devise a clandestine method of arranging meetings with persons to whom he had given assignments.

The indictment then recites thirteen overt acts in furtherance of the conspiracy, which acts consisted of Hirsch's alleged meeting with an individual in Chicago on or about July, 1958, also on or about October 24, 1958; and on or about October 25, 1958, Hirsch met with Melekh in Chicago, and on the same day and at the same place, Hirsch while using the name of John Gilmore introduced Melekh as "Peter" to an individual, and on or about the next day Melekh wrote the names "Peter Stephens" and "Gipsy" on a piece of paper in Chicago and gave an individual ten \$20 bills. Another overt act alleges a meeting by Melekh on or about November 22, 1958, with a person in Newark, New Jersey, and on the same day, Doronkin went to the Pennsylvania Railroad Station in Newark; that on or about November 23, 1958, Melekh, in New York City, gave a person ten \$20 bills; and on the same day Doronkin went to the vicinity of a certain subway station in Brooklyn; that on or about January 17, 1959, Melekh met an individual at Flushing, New York, and accepted a map and photograph from him and gave him \$500, all in violation of 18 U.S.C. § 793.

Count Two charges the same defendants with conspiracy from in about June, 1958, to the date of the indictment, to violate 18 U.S.C. § 951, to induce a United States citizen to act as agent of the U.S.S.R., without prior notification to the Secretary of State and without his being a diplomatic official, for which the agent was to receive valuable consideration for procuring information for the U.S.S.R. It was part of the conspiracy to use fictitious names to conceal the conspiracy. The overt acts of the first count were incorporated by reference, which

U.S.C. § 371.

Count Three charges that in October, 1958, in Chicago, Hirsch acted as an agent of the U.S.S.R. without prior notification to the Secretary of State, and at the request of the U.S.S.R. participated in a meeting between a United States citizen and a representative of the U.S. S.R. to induce the said citizen to collect information for the U.S.S.R., in violation of 18 U.S.C. § 951, and that Melekh aided in the commission of the above offense in violation of 18 U.S.C. §§ 2 and 951.

The motions of defendant Melekh which are here considered and determined are:

1. Motion to dismiss Count One of the indictment for failure to state facts sufficient to constitute an offense against the United States.

2. Motion to dismiss Counts Two and Three for failure to charge an offense against the United States.

3. Motion for bill of particulars.

4. Motion to strike overt acts 8 and 10 from Count Two of the indictment.

5. Motion to strike improper matter from the caption and body of the indictment.

6. Motion to dismiss on the ground the proceeding is within the exclusive jurisdiction of the United States Supreme Court.

7. Motion to dismiss indictment on the ground Melekh is entitled to immunity under the provisions of the United Nations Charter and principles of international law.

The motions of defendant Hirsch here considered and determined are:

1. Motion to dismiss Count One for failure to state a crime under 18 U.S.C. § 793.

2. Motion to dismiss Counts Two and Three on the ground that venue of such charges is improperly laid in the district of this Court, and for failure to charge an offense against the United States.

3. Motion for bill of particulars.

4. Motion to strike overt acts 8 and 10 from Count Two of the indictment.

5. Motion to examine minutes of Grand Jury to establish failure of evidence as to guarded nature of information and upon such finding to dismiss indictment.

Motions of Melekh and Hirsch to dismiss Count One. Both defendants assert the first count of the indictment is fatally defective in that it fails to allege that the information which the conspiracy concerned was "guarded" or secret information, which element the decisions hold to be essential to the existence of a crime. In other words, there is no crime where the conspiracy concerned the gathering of information readily available to all who took the trouble to seek it out and collate it. Defendants contend that the omission is one that cannot be cured by discovery or bill of particulars (Babb v. United States, 5 Cir., 1955, 218 F.2d 538; Lowenburg v. United States, 10 Cir., 1946, 156 F.2d 22); nor can it be inferred from any of the other allegations in the indictment.

Count One follows the language of the act, which defendants concede is ordinarily a sufficient basis for the phrasing of an indictment. They point out, however, that in Gorin v. United States, 1941, 312 U.S. 19, at page 28, 61 S.Ct. 429, at page 434, 85 L.Ed. 488, the Court said:

"Where there is no occasion for secrecy, as with reports relating to national defense, published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government."

And in United States v. Heine, 2 Cir., 1945, 151 F.2d 813, it was held lawful to transmit any information about weapons and munitions which the services themselves made public, as well as information which the services themselves never thought it necessary to withhold. Robertson v. United States, 5 Cir., 1948, 168 F.2d 294, is cited for its holding that where a statute implies an essential ingredient of the offense, it must be al-

leged. And United States v. Carll, 1881, 105 U.S. 611, 612, 26 L.Ed. 1135, requires the indictment to allege all the facts and elements necessary to bring the case within the statute.

Neither the Gorin nor the Heine case concerned a direct attack on the sufficiency of an indictment for lack of an allegation of the secret character of the information purloined.

[1] The Court is of the opinion that inasmuch as the crime charged in Count One is *conspiracy*, the allegations of the indictment are sufficient against a motion to dismiss. The rule as to the sufficiency of the pleadings of the substantive offense which is the object of the conspiracy was clearly set out in Wong Tai v. United States, 1927, 273 U.S. 77, 81, 47 S.Ct. 300, 301, 71 L.Ed. 545, where the Supreme Court said:

"It is well settled that in an indictment for conspiring to commit an offense—in which the conspiracy is the gist of the crime—it is *not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy* * * * *or to state such object with the detail which would be required in an indictment for committing the substantive offense* * * * . In charging such a conspiracy 'certainly to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is necessary.'" (Italics supplied.)

Immediately theretofore in describing the indictment there being considered, the Court had said:

"It charged the defendant, with definiteness and certainty and reasonable particularity as to time and place, with conspiring with a named person and others to commit certain specified offenses in violation of the Opium Act; and further charged him, in like manner with doing various specified acts to effect the object of the conspiracy."

Recently the Second Circuit Court of Appeals in United States v. Switzer, 2 Cir., 1958, 252 F.2d 139, similarly held in a case involving an indictment for conspiracy to transfer a bankrupt's property illegally, that the indictment need not describe the substantive crime with the particularity of an indictment for that offense.

In United States v. Rosenberg, 2 Cir., 1952, 195 F.2d 583, at page 591, which involved an offense similar to the instant one, it was stated:

"The defendants now assert that the indictment, which followed the language of the statute, was fatally defective since it did not allege that the matter there described was not public. But the statutory language necessarily imported its correct judicial interpretation. Consequently the indictment was sufficient under Rule 7(c) of the Federal Rules of Criminal Procedure * * *."

[2] The instant Count One of the indictment more than meets the requisites outlined in the Wong Tai case, supra. The time, place, participants, and overt acts delineated, define the alleged conspiracy with sufficient specificity.

The respective motions of defendants Hirsch and Melekh to dismiss Count One are denied.

Motions of Melekh and Hirsch to Dismiss Counts Two and Three of the Indictment. Both defendants Melekh and Hirsch move to dismiss Counts Two and Three of the indictment for failure to state an offense against the United States, and Hirsch additionally moves for its dismissal on the ground of improper venue. Melekh later joined in this aspect of the motion.

Counts Two and Three charge a violation by conspiracy between the defendants to induce, or to aid and abet, in the inducement of a United States citizen to act as an agent of the U.S.S.R. without prior notification to the Secretary of State, in violation of 18 U.S.C. § 951. By a tortured logic, defendants contend that the counts cannot stand if said Section

951 were not applicable to the person to be induced. They reason that § 951 is not applicable to such person because § 951 is in conflict with the Foreign Agents Registration Act of 1938, 22 U.S.C.A. §§ 611-621, and therefore was superseded by it, except as to those persons not within the purview of the later act. They contend that if this construction were not adopted a person complying with the Foreign Agents Registration Act would ipso facto be violating § 951.

[3] The Court finds no inconsistency between 18 U.S.C. § 951, making it a criminal offense punishable by not more than \$5,000 and/or ten years, for one to act as an agent of a foreign government without prior notification to the Secretary of State, and 22 U.S.C.A. § 612(a) which requires every person who becomes an agent of a foreign principal to register with the Attorney General within ten days after becoming such agent, and prescribes a \$10,000 and/or five-year penalty. The one could be for the purpose of clarification of diplomatic ramifications and the other for security measures. The registering officials are different; the times are different. Nor is the difference in prescribed time for registration necessarily incompatible. Furthermore, as is pointed out by the Government, Section 13 of the Foreign Agents Registration Act provided that

"This Act is in addition to and not in substitution for any other existing statute." 22 U.S.C.A. p. 234.

Finally, because of the later date of enactment of the Criminal Code, Section 951 of Title 18 was in fact enacted later than 22 U.S.C.A. § 612.

Contention is further made that the requirement of registration is in violation of the constitutional privilege against self-incrimination, in that § 612, Title 22, at least requires registration within ten days *after* becoming a foreign agent.

It is intimated in United States v. Kahriger, 1953, 345 U.S. 22, at page 32, 73 S.Ct. 510, at page 515, 97 L.Ed. 754, that one failing to take the action re-

quired has no standing to raise the contention of unconstitutionality of the statute assailed. The Court said:

"If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all." [United States v. Sullivan] 274 U.S. [259] at page 263 [47 S.Ct. 607, 71 L.Ed. 1037]."

The Court goes on, additionally, to point out that in any event the statutory requirement of registration—in that case of persons engaged in the occupation of accepting wagers—was not unconstitutional, because the statute concerned *future* acts, and the constitutional protection covered only *past* deeds. It said (345 U.S. at page 32, 73 S.Ct. at page 515):

"Assuming that respondent can raise the self-incrimination issue, that privilege has relation only to past acts, not to future acts that may or may not be committed. 8 Wigmore (3d ed., 1940) § 2259(c). * * * Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions."

[4, 5] As the Court reads the statute, 22 U.S.C.A. § 612 requiring an agent of a foreign principal to register within ten days after becoming such agent, it means not later than ten days after becoming such agent—there is no prohibition against an earlier registration. One able to make a timely registration with noncriminal consequences but failing to make any registration at any time is hardly in a position to challenge the constitutionality of the statute. Furthermore, the occupations governed by the registration statute in this case, § 591, Title 18, could generally be deemed far more innocuous in character than that of

the occupation of accepting wagers, which was being considered and held valid in the Kahriger case, supra.

[6] As the Government points out, Counts Two and Three do not charge a conspiracy to commit espionage or any crime other than violation of the registration requirement. We have therefore a situation where a statute requires registration although no future criminal activity is anticipated. Such a statute is not unconstitutional because incidentally it might be applicable to one about to be criminally engaged. The case of Communist Party of United States of America v. Subversive Activities Control Board, 1954, 96 U.S.App.D.C. 66, 223 F.2d 531, is supportive of this conclusion.

[7, 8] Defendant Melekh individually contends that Counts Two and Three should be dismissed as to him because as an employee of the United Nations (hereinafter termed U. N.) he is granted specific exemption under the statute, 22 U.S.C.A. § 288d(a), and that while the indictment in those counts does not charge Melekh personally with failure to register, they achieve the same end by charging him respectively with conspiring and aiding. As the Court understands the intent of this act it is to grant a personal exemption to such person as to his own liability for registration. There is no reason to suppose that *carte blanche* privileges were thereby to be accorded the immune person's activities in respect to third parties not so immune. Such activities could hardly be construed to fall within the "immunities of a governmental nature" which defendant contends follows from the Committee Report on the Act (1945 U.S.Code Cong. Service, p. 946). Furthermore, one can be guilty as an aider and abettor, though himself incapable of committing the principal crime (Haggerty v. United States, 7 Cir., 1925, 5 F.2d 224).

[9] While conceding that a charge of conspiracy need not state the substantive criminal object of the conspiracy with detail, the defendants staunchly maintain that Count Two must fail because no

criminal object of the conspiracy is alleged. They contend it is not stated that the United States citizen who was the center of the conspiracy is not alleged to have *known* that he was acting as an agent for a foreign government, and therefore without such knowledge cannot be an agent.

The discussion upon the first motion concerning the phraseology of an indictment for conspiracy is equally applicable to this contention. A reading of Count Two would make it quite clear that the person who was the subject-matter of the conspiracy was fully cognizant of his role as an agent for a foreign government.

[10] Defendants further contend that Counts Two and Three do not properly lie in the Northern District of Illinois inasmuch as the statutory duty of registration which defendants are alleged to have violated was fulfillable only by registration with the Secretary of State in Washington, D. C. Again, defendants have glossed over the precise charges of the indictment, i. e., conspiracy, and aiding and abetting another to violate the statutory duty of registering. The alleged criminal conspiring, and aiding and abetting, are stated in the said counts to have occurred in the Northern District of Illinois and are therefore cognizable in this district. As Judge Duffy long ago said in United States v. Buerk, D.C. 1941, 38 F.Supp. 409, at page 411,

"The proper venue to try a violator * * * would be in the district where he acted as agent without having given prior notification to the Secretary of State."

The case of Travis v. United States, 364 U.S. 631, 81 S.Ct. 358, 5 L.Ed.2d 340, is fully supportive of this court's venue in this cause. The cases are legion that jurisdiction or venue of the crime of conspiracy is proper in the district where the conspiracy was formed or an overt act performed. Annotation to 18 U.S.C. § 371, notes 275, 276.

The motions of Melekh and Hirsch to dismiss Counts Two and Three for fail-

ure to state an offense and improper venue are denied.

[11] *Motions of Melekh and Hirsch for a Bill of Particulars.* Each of the defendants, Melekh and Hirsch, has filed a voluminous, detailed request for a bill of particulars. Their examination indicates that except in one respect, later discussed, the defendants have misconceived the function of a bill of particulars and are attempting to extract, not the details of the charge against them but the minutiae of evidence as well. A reading of the indictment, summarized above, shows that on the whole the defendants have been apprised in far greater detail than Rule 7(c) of the Federal Rules of Criminal Procedure, 18 U.S.C., demands. That Rule states the indictment "shall be a plain, concise and definite written statement of the *essential facts* constituting the offense charged."

It has been said that "The office of a bill of particulars is to inform the accused of the nature of the charge with sufficient precision to enable him to prepare for trial, to prevent surprise or to plead his acquittal or conviction in bar of another prosecution for the same offense." Cyclopaedia of Federal Procedure, § 42.198. The same authority points out however that "it is not the function of the bill of particulars to force the government to reveal its evidence in advance of the trial." Ibid.

The language of the Supreme Court in the Wong Tai case, 273 U.S. 77, at page 82, 47 S.Ct. 300, at page 302, 71 L.Ed. 545, seems to the Court particularly applicable in the instant case. It was said:

"The defendant also made a motion, * * * for a detailed bill of particulars, setting forth with particularity the specific facts in reference to the several overt acts alleged in the indictment, with various specifications as to times, places, names of persons, quantities, prices, containers, buildings, agencies, instrumentalities, etc., and the manner in which and the specific circumstances under which they were committed."

This motion—which in effect sought a complete discovery of the Government's case in reference to the overt acts—was denied on the ground that the indictment was sufficiently definite in view of the unknown matters involved and the motion called 'for too much details of evidence.'

"The application for the bill of particulars was one addressed to the sound discretion of the court, and, there being no abuse of this discretion, its action thereon should not be disturbed * * *."

The motion of Hirsch seeks to know: the kind and nature of documents as to which he is alleged to have conspired; which forts, batteries, etc., the conspiracy was to get material about and whether such material was obtainable from a legally accessible source; which defendants are alleged to have conspired to induce the citizen to procure the material; what the inducement was, whether it was given, by whom, and where; the name of the citizen sought to be induced; the names of those activated to procure information; the information sought; the acts of defendants done to activate the individuals; the names of the individuals referred to in the overt acts; whether they are the same; which overt acts are claimed to have been known to defendant Hirsch; the aid which the defendants conspired to give the citizen to act as agent of the U.S.S.R.; what aid was actually given; what abetment was conspired to be given or was actually given, and to whom, where, and by whom; what counsel was conspired to have been given a citizen to act as agent of U.S.S.R., and what counsel was actually given, and where, when and by which defendant; what inducement was conspired to have been given a citizen to act as an agent of the U.S.S.R., and what if any was actually given, where, when and by which defendant; what procurement was conspired to be given a citizen to act as an agent of the U.S.S.R., or was actually given, where, when and by which defendant; what means were used to conceal the existence of the conspiracy;

what aid was given by Melekh to Hirsch to commit the crime, and when and where it was given; what abetment Melekh gave Hirsch, and when and where it was given; what counsel Melekh gave Hirsch, and when and where it was given; what command Melekh gave Hirsch to commit the crime, and when and where it was given; what inducement Melekh gave Hirsch, and when and where it was given, and similarly as to what procurement Melekh gave to Hirsch.

Defendant Melekh moves by his bill of particulars to ascertain inter alia whether the conspiracy consisted of any specific agreement, and the time, place and circumstances of the making of each such agreement, and the name and address of each party thereto or present at its making; what specified military installations are referred to both within and without Chicago; whether the information was restricted by virtue of a law, regulation or order, and if so which such ruling; what information relating to the national defense is referred to; what supervision it is claimed Melekh gave; who were the "certain" co-conspirators; what acts constituted the activating by defendants as stated by Paragraph 5, Count One; where, when, and in what circumstances and connections and for what purposes Melekh used the pseudonym; what were the specific assignments referred to in the indictment and the exact dates and places of overt acts; to whom did Hirsch identify himself as John Gilmore; the description of slip of paper on which Melekh is claimed to have written, and for what purpose; similarly, the purpose for which Melekh gave money as stated in certain overt acts, and the purpose for which co-conspirator Doronkin did the acts referred to; clarification of the term "the vicinity of"; the physical description and subject matter of the map and photographs; the manner in which the defendant aided, induced, etc., the act alleged; whether the citizen knew or was to know he was acting as an agent of the U.S.S.R.; what other valuable considerations were to be received by the alleged citizen; whether the said citizen was

knowingly to transmit the information to the U.S.S.R.; specification as to whom Melekh was to use fictitious names; what other means were to be used for concealment of the conspiracy; what agents of the U.S.S.R. requested Hirsch to commit the stated acts, and the time, place and means thereof; and what manner Melekh aided, abetted, etc., the offense by Hirsch.

Bearing in mind the overall detailed statement of the alleged offenses in the indictment and the function of a bill of particulars, the Court concludes that except in one respect, the indictment meets the requirements of advising the defendants of the charge they are to meet, the locales, the times, and the objects of the conspiracy. The Court is of the opinion that the further details which the defendants seek are as to matters purely evidentiary in character, and are an unwarranted attempt to ascertain the complete case of the Government in advance and further to limit the scope of the evidence the Government may adduce on the trial. *Rubio v. United States*, 9 Cir., 1927, 22 F.2d 766; *United States v. Rosenberg*, D.C.S.D.N.Y.1950, 10 F.R.D. 521; *Wainer v. United States*, 7 Cir., 1936, 82 F.2d 305; *United States v. Greater Kansas City Retail Coal M. Ass'n*, D.C.W.D.Mo.1949, 85 F.Supp. 503; *United States v. Malinsky*, D.C.S.D.N.Y. 1956, 19 F.R.D. 426; *United States v. Ansani*, 7 Cir., 1957, 240 F.2d 216; *Land v. United States*, 4 Cir., 1949, 177 F.2d 346; *United States v. Chapman*, 7 Cir., 1948, 168 F.2d 997.

In respect to the one exception, i. e., discovery of the name of the "citizen of the United States" and the "individuals" or "individual" referred to in the indictment as being the alleged tool to effect the object of the conspiracy, the Government stated on oral argument of the motion that all these allegations referred to but one and the same person, and indicated willingness to file a formal document to that effect. The Government further indicated that it had every intention of producing the person as a witness in this case; it was reluctant however to spread the person's name on the record

and felt "the interests of the Government should be protected to the extent that * * * [it] be permitted to retain as a secret at least between counsel and the parties, until such time as the case comes to issue and the witness is called to the stand, the name, street address and specific identity of that person." The Government's brief upon this motion also states that the identity would be fully disclosed to the defendants upon the trial; and that in any event if he is not called by the Government as a witness his identity will be furnished to the defendants in advance of trial.

In view of the Supreme Court's ruling in *Roviaro v. United States*, 1957, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639, the Court concludes that justice requires prior to trial the disclosure to the defendants of the identity of the United States citizen.

The respective motions of the defendants for a bill of particulars are denied except that the name of the United States citizen mentioned in the indictment is to be disclosed to the defendants two weeks prior to the date of trial. If the Government deems protective or restricted disclosure necessary, it may make appropriate application.

[12] *Motion of Melekh to strike improper matter from the caption and body of the indictment.* Melekh moves to have stricken the phrases indicating an alias, appearing in the caption and body of the indictment. In those phrases he is referred to as "also known as Peter Stephen and also known as 'Gipsy'" and he complains of the reference to defendant Hirsch as "also known as John Gilmore." He contends that those phrases will be unduly prejudicial as indicating that the defendants used fictitious names and would put the defendants in an "opprobrious light," and if the Government fails to prove the use of those names nothing pertaining to the use of aliases should be before the jury.

The Court concludes that this motion is premature. If the use of aliases be proved by the Government, and that the

of the conspiracy, the defendants have no just cause for complaint at being so described. Judge Major said long ago in *United States v. Solowitz*, 7 Cir., 1938, 99 F.2d 714, at page 715:

"It is also urged that appellant was prejudiced by charging him and his co-defendant under a number of aliases. True, this practice has been criticised by some courts, and we think, not without merit. *Of course, if a person has used names other than his right name, as the record discloses was the case so far as appellant is concerned, and the Government proves such aliases, there can be no legitimate complaint.* Otherwise, it is not difficult to see how a defendant might be prejudiced before a jury. We do not believe, however, the aliases attached to appellant's co-defendant, under the circumstances shown to exist, could have had any harmful effect as to appellant." (Italics added.)

The *Cyclopedia of Federal Procedure*, § 42.66, says:

"If the defendant has an alias, it is proper and sometimes necessary to state it." (Italics added.)

The motion to strike the phrases stating aliases is denied.

[13] *Re Request of Defendant Hirsch for Discovery as to Grand Jury Minutes.* The third aspect of the motion of defendant Hirsch for discovery (the other two aspects are being reserved for decision) pertains to discovery which he seeks of "All books, papers, writings, sketches, documents, maps, photographs, photographic negatives, notes, recordings on tape, wire or other mechanism, and all other objects obtained by the United States from others * * * which * * * were presented to the grand jury in connection with the return of the indictment herein." Defendant Hirsch, in his motion to dismiss the indictment, also, as an alternative seeks leave to examine the minutes of the Grand Jury to establish the Government's failure to in-

roduce evidence of the "secrecy" of the "information" subject of the charge. It is the defendant's contention that the disclosure is to be made "Where there is reason to believe that the evidence presented to the Grand Jury was insufficient to charge the crime—and, therefore, the indictment is subject to dismissal on that ground," citing *United States v. Weber*, 2 Cir., 1952, 197 F.2d 237; *United States v. Geller*, D.C.S.D.N.Y. 1957, 154 F.Supp. 727; *United States v. Holmes*, 3 Cir., 1948, 168 F.2d 888; *United States v. Bridges*, D.C.N.D.Cal. 1949, 86 F.Supp. 922. The Government, however, cites *Costello v. United States*, 1956, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397, wherein the Supreme Court declined to establish a rule permitting defendants in criminal cases to challenge indictments on the ground that they are not supported by adequate or competent evidence.

The cases are legion which hold that the disclosure of grand jury minutes is discretionary with the trial court; that a strong and positive showing is required of persons seeking to break the seal of secrecy surrounding grand jury proceedings. *United States v. Brennan*, D.C. Minn. 1955, 134 F.Supp. 42; *United States v. Alper*, 2 Cir., 1946, 156 F.2d 222; *United States v. Schack*, D.C.S.D.N.Y. 1958, 165 F.Supp. 371; *United States v. Procter & Gamble Co. et al.*, 1958, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed. 2d 1077; *United States v. Socony-Vacuum Oil Co.*, 1940, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129; *United States v. Rose*, 3 Cir., 1954, 215 F.2d 617; *In Matter of April 1956 Term Grand Jury*, 7 Cir., 1956, 239 F.2d 263; *Goodman v. United States*, 9 Cir., 1939, 108 F.2d 516, 127 A.L.R. 265; *United States v. Skurla*, D.C.W.D.Pa. 1954, 126 F.Supp. 711; *United States v. Central Supply Ass'n*, D.C.N.D. Ohio 1940, 34 F.Supp. 241; *United States v. Smyth*, D.C.N.D.Cal. 1952, 104 F.Supp. 283.

The Court is of the opinion that in view of the traditional guard of secrecy granted grand jury proceedings and in view of the detail of the incidents of the conspiracy outlined in the indictment, de-

fendant has not made the strong showing that is required to overcome the policy against disclosure. The request for disclosure of the grand jury minutes or evidence adduced before it is denied.

[14] *Motion of Melekh to Dismiss on Basis Exclusive Jurisdiction of Cause is in Supreme Court.* Defendant Melekh has moved for the dismissal of this proceeding on the ground that exclusive jurisdiction of the cause is in the United States Supreme Court. The bases for this contention are Article III, Section 2, Clause 2 of the United States Constitution which provides that

"In all Cases affecting Ambassadors, other public Ministers and Consuls * * * the supreme Court shall have original Jurisdiction * * *"

and the statute, 28 U.S.C. § 1251, which provides similarly, that

"The Supreme Court shall have original and exclusive jurisdiction of: * * * (2) All actions or proceedings against ambassadors or other public ministers of foreign states or their domestics or domestic servants, not inconsistent with the law of nations * * *."

It is defendant Melekh's position that he is a "public minister" which fact would defeat this Court's jurisdiction.

The facts in respect to this defendant, as disclosed by the pleadings and exhibits, are that he is an employee of the United Nations Secretariat, employed as Chief of the Russian language section in the Office of Conference Services of the Secretariat of the United Nations, as a result of a request from the United Nations. He is a Soviet citizen with the diplomatic rank in Russia of Second Secretary of the Ministry of Foreign Affairs of the U.S.S.R., conferred upon him in accordance with the provisions of the Decree of the Presidium of the U.S.S.R. Supreme Soviet dated May 22, 1943. He entered the United States having a Soviet (not an American) Diplomatic passport on a non-immigrant G-4 visa bear-

ing the notation "Employee of U. N. Secretariat." This G-4 visa is of an alien qualified to pass to and from the U. N. Headquarters under Section 11 of the Headquarters Agreement of the United Nations, 61 Stat. 758 (8 U.S.C.A. § 1101(a) (15) (C)).

The Chief of Protocol, Department of States, certifies that

"I am responsible for the maintenance in the Department of State and have custody of the official records of the Government of the United States regarding (1) the names and status of ambassadors and other public ministers accredited to the United States by foreign governments and received as such by the President in accordance with Article II, Section 3 of the Constitution; and (2) the names and status of all other persons who have been notified to and recognized or accepted by the United States in any capacity which entitles them to diplomatic immunity in the United States pursuant to the Constitution and the laws of the United States made in pursuance thereof and treaties and other international agreements in force between the United States and other governments. * * * I have caused diligent search to be made of such records and have found no record to exist that Mr. Igor Y. Melekh was ever accredited to the United States, or that the said Mr. Igor Y. Melekh was ever notified to and recognized or accepted by the United States in any capacity which would entitle him to diplomatic immunity."

The Department of State has stated to the Embassy of the U.S.S.R. by note dated November 10, 1960, that

"Mr. Melekh has not been accredited to and received by the United States as a diplomatic officer nor as a resident member of a permanent mission to the United Nations within the meaning of Section 15 of the United Nations Headquarters Agreement."

The Government's position that Melekh is not present in this country as a representative of the U.S.S.R. to this country is clearly borne out by this documentary evidence. The Court concludes that Melekh cannot qualify as a "public minister" as the term is used in the Constitution and in the statute.

The Court has no quarrel with defendant's contention for an elastic construction of the Constitution (as called for by *United States v. Classic et al.*, 1941, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368) to permit its basic concepts to grow with the inevitable growth and complexities of an expanding civilization. It may be granted that the purpose of investing the United States Supreme Court with sole jurisdiction of proceedings involving foreign public ministers and their retinues was designed to maintain international peace and "high considerations of public policy" (Ex parte Gruber, 1925, 269 U.S. 302, 303, 46 S.Ct. 112, 70 L.Ed. 280; similarly, Ex parte Hitz, 1884, 111 U.S. 766, 4 S.Ct. 698, 28 L.Ed. 592). However, the Court does not conceive it to have been the intention of the drafters of the Constitution to burden the United States Supreme Court with the solution of legal proceedings not involving representatives of a foreign nation, stationed here, who had no truly diplomatic function.

[15] Assuming the validity of defendant's argument that the phrase "public minister" covers not only the high ranking official, but the lowliest one as well, the Court is of the opinion that there inheres in the word "minister" the thought of representation, such as is clear from defendant's quotation from *In re Baiz*, 1890, 135 U.S. 403, at page 419, 10 S.Ct. 854, at page 858, 34 L.Ed. 222:

"These agents may be called ambassadors, envoys, ministers, commissioners, charges d'affaires, agents, or otherwise, but they possess in substance the same functions, rights, and privileges as agents of their respective governments for the

transaction of its diplomatic business abroad."

Fully supportive of this view are the decisions in *United States v. Coplon*, D.C.S.D.N.Y.1949, 84 F.Supp. 472; D.C.S.D.N.Y.1950, 88 F.Supp. 915.

This Court adopts the learned opinion of Judge Herlands of the United States District Court for the Southern District of New York, 190 F.Supp. 67, 81, and his analysis of the many authorities in their application to this issue. He was correct in all of its aspects, and there is therefore no need to belabor again the contentions of defendant Melekh on this motion.

The motion to dismiss on the basis that exclusive jurisdiction of this proceeding is in the Supreme Court is denied.

[16] *Motion of Defendant Melekh to Dismiss Indictment on the ground of immunity under U. N. Charter and International Law.* Defendant Melekh also moves to dismiss the indictment against him upon the ground that he is entitled to immunity under the provisions of the United Nations Charter and the principles of international law. Conceding that Judge Herlands' opinion extensively discusses the issue he centers his attack upon that opinion. He cites Article 105 of the Charter, Section 2, which provides that

"Representatives of the Members of the United Nations and officials of the organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization." 59 Stat. 1053.

Judge Herlands describes the immunity as a "functional" immunity, but defendant states that description is ambiguous in that a functional immunity may refer to immunity from arrests for acts done in the exercise of one's official functions or to arrests and prosecutions which would interfere with one's performance of his official functions. Defendant contends Judge Herlands' rejection of the

"natural" construction was in error, in taking the first construction. Defendant stresses the latter construction on the ground that an arrest would impede the exercise of any function, and consequently the United Nations Organization itself. Defendant further contends that on analogy to the construction ascribed by writers to the exemption under the League of Nations Covenant, he is entitled to "immunity from arrest and prosecution 'throughout the whole period' for which he held his United Nations post."

The Court is in complete accord with the ruling of Judge Herlands, as well as those of Judge Ryan and Judge Rifkin in the Coplon cases (D.C.S.D.N.Y.1950, 88 F.Supp. 915; D.C.S.D.N.Y.1949, 84 F.Supp. 472).

The motion to dismiss the indictment on the ground of immunity under the provisions of the United Nations Charter and the principles of international law is denied.

Motion to Strike Overt Acts 8 and 10 from Count Two of the Indictment. Defendants challenge the propriety of the inclusion of Overt Acts 8 and 10 in Count Two by reference from Count One. These two overt acts concern activity by Kirill S. Doronkin. Count Two names as co-conspirators solely Melekh and Hirsch, and other persons to the Grand Jury unknown. Defendants assert that since it is self-evident from the allegations of Count One that Doronkin was known to the Grand Jury, he may not be included under the catch-all phrase "other persons to the Grand Jury unknown," and his overt acts are improper in Count Two, he not being a co-conspirator named in said Count. The Government refutes this contention with the holding of *Jones v. United States*, 9 Cir., 1910, 179 F. 584, wherein it was held there was not a fatal variance between indictment and proof because the indictment charged that defendants conspired with each other and with others to the grand jurors unknown, while the evidence showed that the name of another conspirator was in fact known, where the indictment fully set out his connection with the conspira-

cy, designating him by name so as to clearly advise the defendants of the charge against them.

[17] It has been consistently held that an indictment is not subject to an attack of variance where it is disclosed by the evidence that the jury in fact knew the name of a co-conspirator but failed to state it. It was so held by this Circuit in *Fox v. United States*, 7 Cir., 1930, 45 F.2d 364; *Jones et al. v. United States*, 4 Cir., 1926, 11 F.2d 98; *Leverkuhn v. United States*, 5 Cir., 1924, 297 F. 590; *United States v. Heitler*, D.C. N.D.Ill.1921, 274 F. 401.

The Court of Appeals for the Seventh Circuit in the very recent decision in *United States of America v. Gasoline Retailers Association, Inc. et al.*, 7 Cir., 285 F.2d 688, at page 691, decided January 12, 1961, speaking through Judge Castle, said:

"It is contended by appellants that the indictment was insufficient and should have been dismissed because it failed to list the names of some of the co-conspirators whose names were known to the government and the grand jury.

"Rule 7(c) of the Federal Rules of Criminal Procedure provides that the indictment shall be 'a plain, concise and definite written statement of the essential facts constituting the offense charged' and 'need not contain * * * any other matter not necessary to such statement.' The indictment in this case did set forth 'essential facts' constituting the offense of conspiracy in restraint of trade, and there was no need to set out the particular names or identity of possible witnesses who at the trial might prove to have been co-conspirators. *United States v. Glasser*, 7 Cir., 1941, 116 F.2d 690. We are of the opinion that it was not necessary for the indictment to specify the names of co-conspirators even though they were known to the grand jury." (Italics supplied.)

UNITED STATES v. ROSENBERG et al.

United States District Court
S. D. New York.
Dec. 10, 1952.

Proceeding to have vacated and set aside convictions and sentences for conspiracy to violate Espionage Act. The District Court, Ryan, J., held that petitioners were entitled to no relief.

Petitions denied.

I. Criminal Law ⇐997

In proceeding to have convictions and sentences set aside, petitioners failed to establish that newspaper publicity relating to them and to their trial deprived them of trial by an impartial jury, especially in view of their failure at time of trial to move for a change of venue or to make application for adjournment of trial. 28 U.S.C.A. § 2255.

2. Constitutional Law ⇐251

Due process requires compliance not only with outward form of the law but with all that is implicit in the concept of ordered liberty and with the immutable principles of justice.

3. Criminal Law ⇐997

In proceeding to have convictions and sentences vacated and set aside, petitioners failed to establish that "press-releases" and "statements" of public officials including those charged in law with conducting the prosecution or connected with the prosecuting and law enforcement agencies of the Government, which may have prompted, encouraged or generated publicity, resulted in manifestations of public sentiment, or any other form of disorder, calculated to influence court or jury. 28 U.S.C.A. § 2255.

4. Criminal Law ⇐997

In proceeding to have convictions and sentences vacated and set aside on ground that filing of indictment and arrest of witness who gave grand jury testimony relating to petitioners had been purposely scheduled, but his trial was thereafter adjourned, by petitioners' prosecutor to create unfavorable publicity for their trial, court could not inquire into reasons why

prosecutor adjourned trial, but mere fact of delay did not warrant drawing inference suggested by petitioners, and, moreover, petitioners, who raised issue at their trial but did not move for mistrial could not thereafter object. 28 U.S.C.A. § 2255.

5. Criminal Law ⇐633(1)

A defendant may not demand that the machinery of law enforcement be stopped while his trial proceeds, but if an incident occurs during his trial, arising either from prosecution of another or from any other cause which acts to his prejudice, defendant should request appropriate action by trial judge, who has authority to exercise wide discretion to correct any harmful situation.

6. Criminal Law ⇐997

In proceeding to have convictions and sentences vacated and set aside, petitioners failed to establish that testimony by a prosecution witness was perjurious or that prosecutor knowingly, wilfully and intentionally used perjurious testimony. 28 U.S.C.A. § 2255.

7. Criminal Law ⇐741(1), 742(1)

The credibility of a witness and the weight to be given his testimony rests exclusively with the jury.

8. Criminal Law ⇐470

Opinion evidence as to the credibility of a witness, when offered by one who has neither observed witness while he testified nor ever seen him, is inadmissible on any trial.

9. Criminal Law ⇐470

In proceeding to have convictions and sentences set aside on ground that prosecution witness had perjured himself in testifying that he had sketched atom bomb components from memory, affidavits by physicists as to their opinion that it was improbable or impossible for witness to make sketches from memory could not be considered. 28 U.S.C.A. § 2255.

10. Criminal Law ⇐997

In proceeding to have convictions and sentences vacated and set aside, where it was undisputed that photographer, who testified for prosecution that he had not seen petitioners from day they were in his shop

until day of testimony, had in fact been brought to court room to see if he could identify them on day before testimony, such circumstance was not sufficient to grant relief to petitioners on ground that witness was perjurer, in view of fact that petitioners did not deny being in witness' shop and that the material issue, which was what petitioners had said to witness while in his shop, had been resolved by jury adversely to petitioners. 28 U.S.C.A. § 2255.

11. Criminal Law ⇐997

In proceeding to have convictions and sentences for espionage and treason vacated and set aside, petitioners failed to establish that "secret" classification of information allegedly transmitted by them was arbitrary, or that United States Government had information which would have led it to believe that such information was well-known. 18 U.S.C.A. §§ 794, 2388; 28 U.S.C.A. § 2255.

12. Criminal Law ⇐997

Claim that theory of atomic energy in the explosives field was for years known or contemplated by scientists and physicists could not constitute newly-discovered evidence which would justify the vacation and setting aside of convictions and sentences for conspiracy to violate Espionage Act. 18 U.S.C.A. §§ 794, 2388; 28 U.S.C.A. § 2255.

13. Criminal Law ⇐997

Where question, whether information relating to atomic energy which was allegedly transmitted by defendants to a foreign power did in fact involve "secrets", had been submitted to jury in prosecution for conspiracy to violate Espionage Act, such question could not be retried upon defendants' application to have convictions and sentences vacated and set aside. 18 U.S.C.A. §§ 794, 2388; 28 U.S.C.A. § 2255.

14. Treason ⇐13

In prosecution for conspiracy to violate Espionage Act, admission of testimony, to effect that defendant had been member of Communist Party, purely on question of motive and not as proving the charge, did not in effect resolve charges in indictment to allege treason instead of espionage, and

did not result in denial to defendant of constitutional guarantee that testimony of two witnesses to the same overt act be required to sustain conviction of treason against the United States. 18 U.S.C.A. §§ 794, 2388; 28 U.S.C.A. § 2255; U.S.C.A. Const. art. 3, § 3, cl. 1.

15. War and National Defense ⇐48

The specific intent required by the Espionage Act of 1917 to be proved as an element of the crime requires not a purpose to betray the United States, but to aid a foreign power regardless of injury to the United States. 18 U.S.C.A. § 794.

Myles J. Lane, U. S. Atty., New York City, James B. Kilsheimer III, and Robert Martin, Asst. U. S. Atty., New York City, for the Government.

Emanuel M. Bloom, Cleveland, Ohio, for Julius Rosenberg and Ethel Rosenberg.

Howard N. Meyer, New York City, Harold M. Phillips and Edward Kuntz, New York City, for Morton Sobell.

RYAN, District Judge.

Petitions under Section 2255, Title 28 U.S.C.A., have been filed by Julius Rosenberg, Ethel Rosenberg and Morton Sobell praying for an order vacating and setting aside judgments of conviction and sentences imposed upon them on April 5, 1951 after a jury trial at which one of my brothers in this District Court presided as the trial judge. He, for reasons which he has placed upon the record, has disqualified himself from hearing these petitions and they have come on to be heard before me on assignment from the Chief District Judge. Petitioners seek in the alternative a hearing on the petitions "to determine the issues and make findings of fact and conclusions of law, and upon such findings and conclusions, vacating and setting aside the respective sentences of the petitioners and discharging them from detention and imprisonment."

I find no relevant or material issue of fact raised by the petitions, which requires a hearing thereon or which renders the taking of oral testimony either necessary or

helpful. I have concluded, after affording the attorneys for petitioners full opportunity to argue the legal problems presented by the petitions and to make proffers of proof, that the petitioners are entitled to no relief, that the court which rendered judgment had jurisdiction, that the sentences imposed were authorized by law and are not otherwise open to collateral attack on any of the grounds urged by the petitioners¹, and that full and complete enjoyment of the constitutional rights of petitioners has been extended them and has in no way been denied or infringed.

These petitions were filed twenty months after the verdict of guilty was returned by the jury, following a trial which petitioners' attorneys stated "had been conducted

* * * with that dignity and that decorum that befits an American trial" (R.1453),² and that defense counsel had been afforded "every privilege that a lawyer should expect in a criminal case".

The trial record reveals a defense intelligently conducted by able counsel of petitioners' own choice and selection. The verdict of the jury has now been challenged, although when it was returned the attorney for petitioners Rosenberg stated that from the length of time the jury had taken in their deliberations, as well as from the questions they had asked during the course of their deliberations, he was satisfied that the jury had examined the evidence very carefully. (R.1583).

1. Summary of Points Relied on by petitioners, Julius Rosenberg and Ethel Rosenberg as prepared and submitted by their attorneys.

1. Pre-trial and trial publicity, bearing on the issues of the petitioners' case, adversely reflected upon their innocence, pre-conditioned the public mind in the Southern District of New York to an acceptance of their guilt, and created a trial atmosphere of prejudice and hostility toward them, through:

(a) Newspaper publicity developed by the independent initiative and private enterprise of the newspapers and other mass media of communication circulated within the Southern District of New York;

(b) Information, indicating the guilt of the petitioners "fed to" the press and other mass media of communication circulated within the City of New York by the Federal Bureau of Investigation, the Department of Justice, the office of the United States Attorney for the Southern District of New York, and other officials of Government, and reported widely by the said media of publicity;

(c) The indictment of one, William Perl, procured by the prosecuting authorities in the Southern District of New York, in the course of the trial and before the verdict of the petitioners, having the effect of prejudicing the minds of the jurors sitting in the petitioners' cause against the petitioners.

2. The prosecuting authorities knowingly used false testimony to bring about petitioners' conviction.

(a) Alleged cooperation of David Greenglass, main Government witness, with authorities;

(b) Alleged coaching of Greenglass on main elements of case, namely, the subject of alleged transfer.

(c) Schneider testimony

3. The sentencing court was without jurisdiction to impose the sentence: in that the material allegedly transferred and communicated, the gravamen of the offense, was arbitrarily and capriciously classified as "secret", when in fact it was lawfully, widely and publicly known, and its transmittal or communication, therefore, not violative of Sections 32 (a) and 34 of Title 50 U.S.C.A.³

Summary of Points Relied on by petitioner, Morton Sobell, as prepared and submitted by his attorneys.

(a) Abuse of process of Court by Perl indictment plus press statements made in connection with it.

(b) Creation of hostile pretrial atmosphere to Sobell by knowingly false allusions to him as "atom spy" and "member of Klaus Fuchs' spy ring".

(c) Feeding prejudicial material to press, to deprive all defendants of presumption of innocence.

(a. to c. also to be considered together as one point).

(d) Violation of treason clause by use of "treachery and general intent to betray".

(e) Knowing use of false testimony (from Rosenberg petition).

(f) Arbitrary classification of information as secret (from Rosenberg petition).

* 1948 Revised Criminal Code, 18 U.S.C.A. §§ 794, 2388.

2. "R" denotes record on petitions to the Supreme Court for certiorari.

Since the petitioners were sentenced, they have had the benefit of an appeal to the Court of Appeals, 2 Cir., 195 F.2d 583, a petition for rehearing of that appeal, a petition to the Supreme Court for a writ of certiorari, 73 S.Ct. 20, and a further petition to the Supreme Court seeking a rehearing, 73 S.Ct. 134. I have annexed, as an Appendix, a schedule showing in detail the points and objections the petitioners have heretofore urged on the various appeals and petitions they have filed. These appeals and proceedings operate to buttress the presumption of regularity and of due process attending judgments of conviction, especially in the complete absence of credible evidence to the contrary.³

I have considered each ground urged by petitioners as the basis for the granting of the relief they now seek.

Petitioners complain of the pre-trial and trial publicity and argue in substance that it so adversely reflected on their innocence and created a trial atmosphere of such prejudice and hostility toward them as to make impossible the selection of an impartial jury and the conduct of a fair trial. They object to the "newspaper publicity developed by the independent initiative and private enterprise of the newspapers" and say it contributed to a situation by which they were denied the essential requirement of fair play and of justice—a trial by an impartial jury.

We enjoy a free press; neither the policies nor writings of the press may be censored or dictated by the state or government agencies. "Jurors cannot be treated as unable to withstand any effect of newspaper publications." Indeed such a ruling would make it practically impossible to conduct trials in metropolitan centers and would treat the average sceptical juror as a helpless person.⁴

3. Canizio v. People of State of New York, 1946, 327 U.S. 82-84, 66 S.Ct. 452, 90 L. Ed. 545.

4. United States v. Keegan, 2 Cir., 1944, 141 F.2d 248, 258.

5. "The effect of inflammatory reporting in large metropolitan communities, where it is most likely to occur, is especially open to question. The daily sensations

Newspapers, unquestionably in response to popular demand, feature with large headlines and considerable space reports of investigations of corruption, crime, vice and espionage activities. The trials of those charged with these offenses have been made "sensational" and have been the source of what is well-nigh universally considered by the newspapers as "good copy." I need not here consider the wisdom of attempts at judicial curtailment of such publications, or the dangers to our constitutional guaranties of freedom of speech and press which would flow in the wake of unwarranted judicial restrictions on free expression.

A reading of the newspaper articles submitted by petitioners reveals nothing of an unusual or inflammatory character. The articles seem but a fair response to a legitimate public interest in a matter of vital concern to all—the atom bomb and atomic energy and the hope for its employment for the benefit and not the destruction of mankind. The accounts of the arrests and subsequent indictments of petitioners tended to allay a public anxiety and to give assurance that those charged with the protection of vital information were alert and diligent in the performance of their obligations.

When these publications are measured against the field in which they were circulated their effect upon the general public is seen as negligible.⁵ There was no unseemly rush to bring the petitioners to trial. Julius Rosenberg was arrested on July 17, 1950; Ethel Rosenberg on August 11, 1950 and Morton Sobell on August 18, 1950. The trial began on March 6, 1951, shortly less than seven months after the arrest of Sobell, the last defendant to be taken into custody. Any public prejudice which might be ascribed to newspaper publicity incident to the arrest of these defendants had long

that are repeated to a sophisticated population are seldom remembered, nor are they effective in shaping attitudes. Given large jury lists and the lack of homogeneity of these communities, it should always be possible to find twelve persons whose minds have not been poisoned by pre-trial sensationalism." Yale Law Journal, Vol. 59, No. 3, p. 543, Feb. 1950.

since been dissipated among the populace of the area from which talesmen were drawn—an area where occurrences no matter how sensational lose their news value and no longer attract public interest after a much shorter space of time than seven months.

When the indictment was called for trial no application was made for a continuance and the petitioners announced that they were ready. No objection was then urged that newspaper publicity had produced so hostile an atmosphere or so prevalent a public preconception of guilt as to make the selection of a fair and impartial jury either difficult or impossible. Although I recognize that a defendant "is not obligated to forego his constitutional right to an impartial trial in the district wherein the offense is alleged to have been committed,"⁶ I feel that the failure of the petitioners to apply for a change of venue has added significance when considered with their omission to make application for an adjournment of the trial. This neglect of the petitioners to avail themselves of long-established remedies supports the conclusion that the publicity of which they now complain was neither so damaging nor widespread in effect as they now urge. The petitioners and their attorneys were no strangers to the great metropolitan district in which the trial took place. It would be ridiculous to hold that if the publicity before trial had been so prejudicial as to inflame and infect the public mind they could have been entirely ignorant of it.⁷

6. *Delaney v. U. S.*, 1 Cir., 1952, 199 F.2d 107, 116.

7. In his reply affidavit submitted on this application, it is stated by counsel for petitioners Rosenberg that the "entire panorama" of pretrial publicity could not have been revealed to him by the "usual sporadic reading of an average newspaper reader in New York City"; and that he was "unaware of the total picture." p. 3, aff. of E. Bloch, 12/2/52

8. Record pp. 43-158.

9. The Trial record contains the following: "The Court: You waive your last challenge? Mr. A. Block: That is correct. Mr. Saypol: Challenges waived and the

The voir dire examination of the prospective jurors was fully and fairly conducted by the trial judge.⁸ The petitioners were granted ten additional peremptory challenges; they did not exercise all of these and informed the court that the jury was satisfactory.⁹ This was the considered judgment and decision of the "highly competent and experienced"¹⁰ attorneys who represented the petitioners on the trial.

[1] Quite aside from the question of whether this objection may now for the first time be advanced as a ground for a new trial¹¹ I find no evidence to support the claim that the trial proceeded under conditions which deprived the petitioners of the opportunity for a fair trial before an impartial jury.

In fact, an examination of the chart which petitioners have submitted purporting to analyze "Quantitative Reportage, Feb. 1, 1950 to April 3, 1951" dealing with news items classified in four groupings—"Atomic Espionage", "Communists as Spies", "Atomic Bomb" and Rosenberg-Sobell Case"—sustains this conclusion. I find that from the latter part of August 1950 to November 1950 there was only minor and sporadic coverage and that from November 1950 until February 21, 1950, which was approximately two weeks prior to the commencement of the trial, there were no news items whatsoever concerning the pending prosecution. During the following week from February 21 to 28, 1951, the publicity was negligible, and when the trial proceeded, the

The Court: Very well.

Mr. Kuntz: Satisfactory to the defendant.

The Court: Jury satisfactory all around.

Mr. E. H. Block: Satisfactory all around." (R.152).

10. *U. S. v. Rosenberg*, 2 Cir., 1952, 195 F.2d 583, 593.

11. *Smith v. U. S.*, 88 U.S.App.D.C. 80, 187 F.2d 192, certiorari denied 341 U.S. 927, 71 S.Ct. 792, 95 L.Ed. 1358; *U. S. v. Walker*, 2 Cir., 1947, 197 F.2d 287; *U. S. ex rel. Marshall v. Snyder*, 2 Cir., 1947, 160 F.2d 351.

attendant publicity reveals nothing extraordinary or unusual.

Petitioners next object to publicity which resulted from "press-releases" and "statements" emanating from the office of the United State Attorney and the Department of Justice.

It appears from the exhibits submitted by petitioners that as the trial proceeded there were daily reports in the newspapers of the progress of the trial, the witnesses called and the testimony given. On a few occasions during the trial "statements" were made to the press by those charged in law with conducting the prosecution. It appears further that following the arrest of the petitioners and prior to trial "press-releases" were issued by the prosecuting and law enforcement agencies of the Government.

[2] The issuance of "releases" and "statements" by the quasi-judicial officials entrusted with the heavy burden and grave responsibility of prosecution giving in advance of trial details of evidence which it is expected will be introduced at trial is an all too prevalent practice, which should not be encouraged. It does not aid in the administration of justice and often hampers and impedes complete investigation of the crime, which might be productive of further evidence if not of other crimes. It is opposed to all fundamental concepts of due process and, if carried to an extreme, might result in conviction by public opinion without the benefit of jury. Due process requires compliance not only with the outward form of the law but with "all that is implicit in the concept of ordered liberty"¹² and with the immutable principles of justice. But, even though the "press-releases" and "statements" of public officials may have prompted, encouraged or generated publicity, there is no evidence that these publications resulted in "manifestations of public sentiment, or any other

form of disorder, calculated to influence court or jury"¹³.

There is no evidence that any juror after being sworn violated the trial judge's instruction and read any newspaper report or article concerning the trial of petitioners. There is no proof to sustain a finding that the judgment of the jurors was in any manner influenced or swayed adversely to the petitioners, either prior to or during the trial. This is not an instance where "the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which is generated."¹⁴

The petitioners also claim that the publicity attending the indictment for perjury and the arrest of William Perl, which occurred while the trial was in progress, had the effect of prejudicing the minds of the jurors against the petitioners.

The facts concerning the Perl indictment and arrest are not in dispute. He had been a witness before a Grand Jury in this district; he was indicted by that Grand Jury on March 13, 1951 and when the indictment had been returned it was ordered sealed. Late the following day the indictment was unsealed upon application to the judge presiding at petitioners' trial; the application was made to him because the judge then assigned to that duty was not available. Perl was then arrested and arraigned on March 15, 1951, not before the trial judge, but in the part where such arraignments are held. There was nothing unusual in the procedure followed. The indictment against Perl charged perjury before the Grand Jury; it contained four counts: the first count was with respect to his testimony concerning the petitioner Sobell; the second count contained charges with respect to his testimony concerning Helene Elitcher, the wife of Max Elitcher who had appeared as a Government witness on the trial of the petitioners before the return of the Perl

12. *Wolf v. People of State of Colorado*, 1949, 338 U.S. 25, 27, 69 S.Ct. 1359, 1361, 93 L.Ed. 1782; citing *Palko v. State of Connecticut*, 1937, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288.

13. *Frank v. Mangum*, 1915, 237 U.S. 309, 35 S.Ct. 582, 591, 59 L.Ed. 969, 984.

14. *Shepherd v. State of Florida*, 1951, 341 U.S. 50, 51, 71 S.Ct. 549, 95 L.Ed. 740.

formation he had acquired while working at the Los Alamos project, and that he had last worked there in February, 1946,—four and one-half years before he testified (R.461, 463, 609); and, that since his arrest and during his confinement in jail he had not been given any reference work, texts or scientific books. (R.610). He further testified that he had not received help from anybody in the preparation or drawing of these exhibits.

Exhibit 8 was impounded by the trial judge after being introduced in evidence.

Petitioners now submit affidavits from three individuals, represented as experts in the field of physics, who express the opinion that it is "improbable" that Greenglass could have reproduced the sketches from memory. A fourth affidavit from a scientific writer or correspondent for a newspaper records his opinion as to the "impossibility" of Greenglass' being able to make these sketches from memory. It is upon these "opinions" that petitioners would have me find that Greenglass gave perjurious testimony concerning the circumstances surrounding the drawing by him of these exhibits. None of these four affiants could possibly have seen Exhibit 8, which had been impounded.

[7-9] There may be some rare instances when a trial judge permits testimony by medical experts as to the competence or probity of a witness when appraised solely on his mental ability to testify truthfully,—that is, whether the witness is a pathological liar or mentally incapable of telling the truth. But it is hornbook law that the credibility of a witness and the weight to be given his testimony rests exclusively with the jury. Opinion evidence when offered by one who has neither observed the witness while he testifies nor ever seen him is inadmissible on any trial and may not be considered by me as the basis for a conclusion that perjury was committed.

[10] 3. The next objection as to the knowing use of perjurious testimony concerns the witness Ben Schneider, who was called in rebuttal by the Government.

Schneider testified that he was a photographer and that he had a store at 99 Park

Row, where his main business was taking photographs for passport and identification purposes; that in May or June, 1950 the petitioners Rosenberg and two children visited his shop and ordered and paid for three dozen photographs, passport-size, for which he was paid \$9.; that Julius Rosenberg at the time told him that he was going to France; that some property had been left his wife and that they were going to take care of it. (R.1428-29). Schneider further testified that he had first been told he would be a witness at about 11:30 A.M. on the day before he testified when he had been visited by some agents of the Federal Bureau of Investigation (R.1425).

Just prior to the close of his direct examination, Schneider was asked, with reference to the last time he had seen Julius Rosenberg, the following question to which he made the following response:

"Q. And is that the last time you saw him before today? A. That's right."

It is not disputed that on the day prior to Schneider's testimony he had been brought into the trial courtroom for the purpose of seeing whether he could identify Rosenberg as the person whose photograph he had taken. There was no motive for falsehood on the part of Schneider and there is not the slightest evidence that Schneider's testimony on this was intentionally false. I hold it to be on an immaterial point because the petitioners Rosenberg did not deny on cross-examination prior to Schneider's appearance as a witness that they had been in Schneider's store. Thus, Julius Rosenberg was questioned:

"Q. Did you go to a photographer's shop at 99 Park Row and have any photos taken? A. I have been in many photographers' shops and had photos taken."

"Q. Did you have any taken in May or June of 1950? A. I don't recall. I might have had some photos taken."

* * * * *

"Q. Now, do you recall, or are you sure now that you didn't have any passport pictures taken in 99 Park Row, in May or June 1950? A. I

may have taken pictures, not—I didn't take any passport pictures.

"Q. May or June 1950? A. I might have taken pictures."

"Q. For what purpose have you taken pictures in May or June 1950? A. I have already answered that."

"Q. May we have an answer? A. Just taken pictures" (R.1278-79).

The testimony of petitioner Ethel Rosenberg at no point shows a categorical denial that she and her family had gone to the photographer's shop at 99 Park Row in May or June 1950.

The vital portion of Schneider's testimony was his recollection of what Julius Rosenberg had told him; on that a sharp issue was raised and it appears from the verdict to have been resolved by the jury adversely to the petitioners. The challenge now made to Schneider's testimony does not stamp him as a perjurer.

Petitioners also urge that their conviction should be set aside because the evidence failed to show that all the information which they conspired to transmit was of such a character as could properly be classified secret.

To establish need for the secrecy of some of the information unlawfully transmitted, the Government called a physical chemist who had been employed as an engineer at the Los Alamos Scientific Laboratories from 1944 through part of 1947. He testified that the work "was associated with implosion research connected with the atomic bomb." (R.470). He identified Exhibit 2 as a reasonably accurate portrayal of a type of lens used at Los Alamos. (R.473). He gave similar testimony as to Exhibit 6 (R.474). He identified Exhibit 7 as a rough sketch of an experimental set-up (R.477), and testified that Greenglass in his employment had access to the information shown on these exhibits. (R.479). He testified that information relating to the lens mold, the lens and the experimentation had been classified as secret. (R.478-9). He gave his expert opinion that of the experimentation "there was no information in text books or technical journals on this subject" (R.478), and

that it concerned "a new and original field." (R.478). Just before this witness left the stand the court inquired of him—

"Q. While there might have been some other details that might also have been of some use to a foreign nation which were not contained on Exhibits 2, 6 and 7, the substance of your testimony is that there was sufficient on Exhibits 2, 6 and 7 to reveal to an expert which was going on at Los Alamos? A. Yes, your Honor." (R.485-6).

The Government also called another engineer who was familiar with the work at Los Alamos. He testified that the sketch—Government's Exhibit 8—when considered with the material Greenglass testified he had disclosed, demonstrated "substantially and with substantial accuracy the principle involved in the operation of the 1945 atomic bomb" (R.910) and that it was classified as top secret (R.911).

Although petitioners were found guilty of conspiring to transmit many items of classified information, their present attack on such classification as "arbitrary and capricious" is directed to but one item—information relative to the use of the lens in the atomic bomb.

They contend that there was nothing informative or new about the details of the high-explosive lens used in atomic weapons, that the theory underlying the use of the lens and implosion has been known for many years. They have listed the names and authors of various treatises and texts in the field of nuclear physics, and from this would have me conclude that the experimentation in the use of the atomic bomb which was disclosed was a matter of public knowledge.

[11] Assuming that what they say is so—that the theory of atomic energy in the explosives field was known or contemplated years ago by scientists and physicists—it does not follow that the practicability and feasibility of applying this theory to the manufacture of modern war implements was common knowledge to any other country. Certainly, we cannot say that in the United States this information has been made public, nor can we assume that it "has

thus become available in one way or another to any foreign government"¹⁸. Petitioners offer no evidence to support their contention that the classification of this information was arbitrary, or that the United States Government had information which would have led it to believe it was well-known.

[12] The claim now made by petitioners cannot be said to constitute newly-discovered evidence. The very basis of their argument that prior knowledge of this use of atomic energy is revealed by the recorded experiments and treatises of numerous physicists was evidence available to them during the trial and an issue which could have been presented then and considered by the jury in its determination of the nature of the information which petitioners conspired to transmit.¹⁹

[13] This issue of fact was presented to the jury by the trial judge (R.1554); it was resolved against the petitioners; it may not be retried on this application.

[14] An additional ground for relief is urged by petitioner Sobell under the Treason Clause of the Constitution, Art. 3, Sec. 3, Cl. 1, which provides in part that "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."

It is argued that this clause was violated by the admission of evidence of a "general intent to betray", unsupported by the testimony of two witnesses; that such testimony was erroneously admitted to prove the specific criminal intent to give secret information required by the Espionage Act; and that absent a prior showing of specific criminal intent, evidence of a general treasonous intent can under the Treason Clause only be established by the testimony of two witnesses.

At trial there was testimony offered and received over objection by petitioner's attorney (R.198, 205) that Sobell had been a member of the Communist Party in 1939-1941. At one point in a long discussion con-

cerning the admissibility of this evidence, the trial judge inquired of the United States Attorney the theory on which it was offered, and the following colloquy ensued:

"The Court—On what theory are you offering it? To prove the offense in the indictment?"

"Mr. Saypol—Oh, indeed not; to prove association, to prove intent, to prove motive for the crime which will be proved."

"The Court—Very well. I will overrule the objection." (R.199).

Later the trial judge said that he was admitting the evidence "purely on the question of motive and not as proving the charge" (R.200); still later the trial judge observed "you have to have intent; you have to have criminal intent," at which point Sobell's attorney remarked "this statute, every word of it, the statute reads with intent, or reason to believe." (R.201).

The objection interposed to the reception of this testimony was couched in terms that it was "incompetent, irrelevant and immaterial to the issues in this case and can only inject an extraneous issue that will confuse the jury and prejudice the defendants." (R.199). At no time was objection made that the reception of this testimony in the prosecution of an indictment returned for violation of Section 34, Title 50 U.S.C.A., would in effect resolve the charges in the indictment to allege Treason instead of Espionage, or result in denial to the petitioners of the constitutional guarantee that "the Testimony of two Witnesses to the same overt Act" be required to sustain a conviction of Treason against the United States. No mention was made by the petitioners of *Cramer v. United States*, 1944, 325 U.S. 1, 65 S.Ct. 918, 89 L.Ed. 1441, as being the basis upon which the objections were made.

The trial judge specifically instructed the jury that this testimony was to be considered "solely on the question of the defendants' intent or reason to believe that the alleged secret information to be transmit-

ted would be used to the advantage of a foreign nation".²⁰

[15] The Espionage Act of 1917 "makes criminal * * * the communication of the prohibited information to the advantage of 'any foreign nation,' even if such communication does not injure this country."²¹ The specific intent required by the Statute to be proved as an element of the crime requires not a purpose to "betray" the United States, but to aid a foreign power regardless of injury to the United States.²² The Court of Appeals so held and doing so approved the instructions of the trial judge.

All of the petitioners on their appeal to the Court of Appeals questioned the admissibility of this testimony, but they did so on the same general objections made during the trial. None, then, presented the constitutional objection now urged, nor was it raised in their applications to the Court of Appeals for re-hearing. The Court of Appeals held that this testimony was properly admitted.²³ The petitioners Rosenberg in their petitions to the Supreme Court for certiorari urged the admission of this testimony to be error and cited "*Cramer*", supra. The petitioner Sobell also relied upon a claim of error in the admission of this testimony and on his petition to the Supreme Court for re-hearing specifically presented the constitutional objection now raised.

20. In his charge the trial judge said:

"Now I wish to instruct you at this point that I have admitted testimony as to membership or activity in the Communist Party and also testimony to the effect that the Communist Party is dedicated to furthering the interests of the Union of Soviet Socialist Republics solely on the question of the defendants' intent or reason to believe that the alleged secret information to be transmitted would be used to the advantage of a foreign nation, in this case the Union of Soviet Socialist Republics, which is an element of the charge that the Government must prove beyond a reasonable doubt.

I wish to caution you most strenuously that proof of Communist Party membership or activity does not prove the offense charged in this indictment, but may be considered by you solely on the question of intent which is one element of the crime charged here." R. 1558).

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Ample opportunity was afforded the petitioners to raise the objection now urged as to the admissibility of this testimony at trial and again in the Court of Appeals. But, it is not necessary to hold that it may not now be made because of the limited power we have under Section 2255²⁴, for I conclude that this objection is without merit.

The petitions are denied; the files and records of this case and the papers and exhibits now submitted conclusively show that the petitioners are entitled to no relief.²⁵ Since I find no substantial question of law raised by these proceedings, the application made on behalf of the petitioners Rosenberg for a stay of execution of the judgment pronounced against them is denied.

Appendix

The following is a list of the points which have heretofore been raised by the petitioners.

By the petitioners, Rosenberg.

In the Court of Appeals:

1. Constitutionality of Espionage Statute.
 - a. Statute is vague and indefinite.
 - b. Intent provisions are vague and indefinite.
 - c. Statute does not establish a sufficiently certain standard of guilt.
2. Sufficiency of indictment.

21. U. S. v. Rosenberg, supra, 195 F.2d at page 590.

22. Id.

23. On the importance of this and similar testimony to the establishment of the Government's case, the Court of Appeals wrote, "If the jury believed her (Miss Bentley), she supplied the missing link connecting the Communist Party with the Soviet Union, and making Communist Party membership probative of motive or intent to aid Russia." U. S. v. Rosenberg, supra, 195 F.2d at pages 595-596.

24. Cf. U. S. v. Walker, supra; Smith v. U. S., supra; U. S. v. Snyder, supra.

25. U. S. v. Hayman, 1952, 342 U.S. 205, 72 S.Ct. 263.

18. U. S. v. Heine, 2 Cir., 1945, 151 F.2d 813, 817.

19. Gorin v. U. S., 1941, 312 U.S. 19, 31-

32, 61 S.Ct. 429, 85 L.Ed. 488, rehearing denied 312 U.S. 713, 61 S.Ct. 617, 85 L. Ed. 1144.

3. Conduct of Trial Judge as a deprivation of a fair trial.
4. Prejudicial Instructions to Jury.
 - a. Special need to enforce law.
 - b. Distortion of defense theory.
 - c. Refusal to read cross-examination to jury.
5. Errors in reception of evidence.
 - a. Communist belief and affiliation as evidence of motive and intent.
 - b. Bentley-Julius telephone calls.
 - c. Theft by Rosenberg of proximity fuse.
 - d. Use of sketches of lens and atom bomb.
 - e. Receipt of Schneider testimony.
6. Sentence of death constituted cruel and unusual punishment.

In the Court of Appeals on Petition for Rehearing:

1. The conviction violated the Treason Clause in the Constitution.
2. The capital punishment portion of the Espionage Statute is unconstitutional.

In the Supreme Court on Petition for Writ of Certiorari:

1. Constitutionality of Espionage Act under First and Fifth Amendments.
2. Sufficiency of indictment under Sixth Amendment.
3. Whether convictions rest on evasion of treason clause.
4. Whether conduct of Trial Judge deprived defendants of fair trial.
 - a. Bias of judge.
 - b. Improper instructions.
 - c. Distortion of evidence.
5. Improper receipt of evidence.
 - a. Communist evidence relating to Defendants' Intent.
 - b. Bentley-Julius telephone calls.
 - c. Schneider testimony.
6. The sentence of death as cruel and unusual punishment.

In the Supreme Court on Petition for Rehearing:

1. Espionage Act as construed violates Treason Clause of Constitution.

2. Espionage Act as construed rendered criminal offenses "of the same kind as treason", but not treason.
 3. Proof of criminal intent by imputation from Communist Affiliation was Improper.
 4. Sentences were based on improper factual basis.
 5. Sentences were excessive.
- By the petitioner, Sobell.

In the Court of Appeals:

1. Insufficiency of evidence.
2. Testimony showed two conspiracies.
3. Insufficiency of indictment.
4. Errors in reception of evidence or misconduct depriving defendant of fair trial.
 - a. The Communist Issue as evidence of motive or intent.
 - b. Evidence establishing Sobell had been deported from Mexico.
 - c. Conduct of Court (relying on issue as raised by Rosenbergs).
 - d. Conduct of prosecutor.
5. Court had no jurisdiction over person of Sobell because he was forcibly seized in a foreign county.

In the Court of Appeals on Petition for Rehearing:

1. Double conspiracy argument.
2. Error in receipt of evidence of political views on issue of intent.
3. Denial of Fuller Bill of Particulars was error.

In the Supreme Court on Petition for Writ of Certiorari:

1. Double conspiracy argument.
2. Whether Sobell was denied a fair trial.
 - a. References to "treason".
 - b. Testimony relating to Communist Party membership and activity.
 - c. Conduct of trial judge and prosecutor.
 - d. Evidence of flight to Mexico.
 - e. Evidence that defendant was deported from Mexico.
3. Sufficiency of evidence.

4. Evasion of Treason Clause of Constitution.
5. Constitutionality of statute and sufficiency of indictment.
6. Alleged kidnapping of defendant.

In the Supreme Court on Petition for Rehearing:

1. Construction of Espionage Act conflicted with Treason Clause of Constitution.
2. Proof of Communist Party membership did not prove requisite intent.
3. Sentence was arbitrary and appellate courts should modify it.



**GALION IRON WORKS & MFG. CO. v.
BUFFALO-SPRINGFIELD
ROLLER CO.**
Civ. No. 1338.

United States District Court
S. D. Ohio, W. D.
Oct. 30, 1952.

Suit for infringement of a patent and for a declaratory judgment that patents owned by defendant were invalid and not infringed by plaintiff. Defendant filed four counterclaims for infringement of three patents by plaintiff and a declaratory judgment of invalidity and non-infringement of plaintiff's patent. The District Court, Nevin, C. J., held that certain claims of plaintiff's patent were valid and infringed by defendant and that defendant's patents were invalid.

Judgment for plaintiff.

1. Patents ⇨328

Greiner Patent No. 2,442,563 for road roller frame means for protecting motors and radiators from dust is invalid.

2. Federal Civil Procedure ⇨2262

In non-jury cause, the place of District Court's opinion must be taken by formal fact findings and conclusions of law separately stated and numbered.

A patent is presumed to be valid, and burden rests on party assailing it to prove its invalidity.

4. Patents ⇨26(1)

The fact that patent claims are combination claims does not of itself render patent invalid, but claims are invalid, unless combination is a new one.

5. Patents ⇨26(2)

Where an old article must be physically changed, even slightly, to fit new use of article covered by combination claims of patent, it becomes a new machine or manufacture within patent law.

6. Patents ⇨91(1)

In patent infringement suit, burden was on defendant corporation to prove by at least a preponderance of evidence its contention that patentee was not original inventor of subject-matter of patent, but that invention was conceived and originated by another and disclosed by him to patentee before any conception of invention by patentee.

7. Patents ⇨312(1½)

In patent infringement suit, burden was on defendant, asserting plaintiff's laches, to prove such laches as to estop plaintiff from enforcing patent, if valid, against defendant.

8. Patents ⇨312(1½)

In patent infringement suit, burden was on defendant, asserting plaintiff's laches, to show that delay, if any, in bringing suit, resulted in injury to defendant because of some inequitable conduct of plaintiff and that there was such a delay as resulted in injury or prejudice to defendant, rendering it inequitable for plaintiff to prevail.

9. Patents ⇨328

Keeler Patent No. 2,197,395, claims 1, 4, 13, 18, for a trench roller, are valid and were infringed.

10. Patents ⇨20

Mere repositioning or transposition of parts of old machine does not constitute invention.

135 F.2d 482, to support their contention that the form and not the substance of a trust is determinative of the incidence of taxation and that no judicial inquiry into the conduct of the parties or the actual operation of the trust should be made. Respondent seeks to distinguish that ruling. We do not think it should be applied to the facts of this case. The rule expressed in *Commissioner of Internal Revenue v. Tower*, 327 U.S. 280, 291, 66 S.Ct. 532, 538, 90 L.Ed. 670, "By the simple expedient of drawing up papers, single tax earnings cannot be divided into two tax units and surtaxes cannot be thus avoided", evidences an intention that the results achieved is the criteria for determining the incidence of taxation rather than the "legal paraphernalia" employed to attain such results. The Tax Court was justified in considering the results achieved rather than limiting its consideration to the language of the trust agreements. In support of its conclusion, the Tax Court could properly consider the family relationship of all the parties; the parents' desire to divest themselves of their interest in the partnerships; the manner of creation and number of the trusts; that the father admittedly wanted his three sons to carry on the business; that the two elder sons did manage it; even if not tacitly admitted, the inference, at least, that the gifts of cash to each son were applied to the purchase of the partnership interest which was transferred to the trusts created for each son's benefit; and that notes given for the balance were paid from partnership profits; in short, the entire background of the transactions and business which earned the income.

[4, 5] The findings of the Tax Court³ that it was the intention of the grantors

3. "We believe that it is fair to infer from the facts of this case that although the distributions of trust income were to be made at the 'discretion' of the trustees, the intention of the grantors was that the beneficiaries could have what they wanted of the trust income and that the discretionary provision was more in the nature of a safeguard to be withheld unless family considerations dictated its enforcement. Albeit there is no evidence of any collusion by the trustee-beneficiaries, on the other hand, there is no

that the beneficiaries "could have what they wanted of the trust income" and that they "requested and got such amounts of trust income as they desired" are supported by the evidence and, since the beneficiaries possessed such command over the distribution of the income of the trusts, such income, whether distributed or not, is taxable to them. *Spies v. United States*, 8 Cir., 180 F.2d 336. The decision of the Tax Court is neither contrary to law, nor clearly erroneous as without factual support. It is therefore, affirmed.

HUTCHESON, Chief Judge (dissenting).

In agreement with the views of the dissenting judges of the Tax Court, I dissent from the opinion of the majority.

Rehearing denied, HUTCHESON, Chief Judge, dissenting.



UNITED STATES v. ROSENBERG et al.
Nos. 137-138, Docket 22201, 22202.

United States Court of Appeals
Second Circuit.

Argued Jan. 10, 1952.

Decided Feb. 25, 1952.

Rehearing Denied in No. 22201
April 8, 1952.

Defendants were convicted in the United States District Court for the Southern District of New York, of conspiracy to violate Espionage Act by combining to communicate secret information to Russia, and they appealed. The Court of Appeals, Frank, Cir-

evidence of any substantial discretion exercised. The evidence indicates that the beneficiaries requested and got such amounts of trust income as they desired. The fair inference is that they got what they wanted. In our opinion the evidence is sufficient to cause this trust income to be taxed to the beneficiaries. *Edward Mallinckrodt, Jr.*, 2 T.C. 1128; affirmed [*Mallinckrodt v. Numan*, 8 Cir.] 146 F.2d 1. *Edgar R. Stix*, 4 T.C. 1140; affirmed [2 Cir.] 152 F.2d 562."

cuit Judge, held, inter alia, that evidence sustained convictions.

Judgment affirmed.

See also 10 F.R.D. 521.

1. War and National Defense ⇨48

The Espionage Act makes criminal, and subject to prescribed penalties, the communication of prohibited information to advantage of any foreign country, even if such communication does not injure this country, and regardless of whether foreign country be friend or enemy.

2. Indictment and Information ⇨110(10)

Indictment for conspiracy to violate statute prohibiting communication of prohibited information to advantage of foreign nation, which followed language of statute was not fatally defective by reason of absence of allegation that information furnished was not public, since statutory language necessarily imported correct judicial interpretation that statute was inapplicable to public information. 18 U.S.C.A. §§ 793, 794; Fed.Rules Crim.Proc. rule 7(c), 18 U.S.C.A.

3. Constitutional Law ⇨258

War and National Defense ⇨36

Espionage Act is sufficiently definite and certain in conduct it prohibits to apprise public thereof, and is consonant with due process. 18 U.S.C.A. §§ 793, 794; Fed. Rules Crim.Proc. rule 7(c), 18 U.S.C.A.; U.S.C.A.Const. Amend. 5.

4. Constitutional Law ⇨90

War and National Defense ⇨36

Espionage Act forbidding communication of prohibited information to advantage of any foreign country when done so with reason to believe that same is to be used to injury of United States or to advantage of foreign nation, is not invalid under First Amendment to Federal Constitution, since statute forbids nothing except communication and communication to foreign government of secret material is not within area of protected free speech. 18 U.S.C.A. §§ 793, 794; U.S.C.A.Const. Amend. 1.

5. Criminal Law ⇨13

A criminal statute must be sufficiently definite to give notice of required conduct to one who would avoid its penalties, and to

guide judge in its application and lawyer in defending one charged with its violation, but no more than reasonable degree of certainty is demanded and risk is upon he who deliberately goes perilously close to area of proscribed conduct that he may cross prohibited line. U.S.C.A.Const. Amends. 5, 6.

6. Criminal Law ⇨742(1)

Under federal judicial system, credibility of witnesses in criminal prosecution and reliability of testimony is for jury, and court is not allowed to consider such questions.

7. Conspiracy ⇨47

Evidence sustained convictions for conspiracy to violate Espionage Act. 18 U.S.C.A. §§ 793, 794.

8. Criminal Law ⇨856(2)

In prosecution of defendants for conspiracy to violate Espionage Act, wherein it was contended that trial judge had been guilty of misconduct which had deprived defendants of fair trial, when judge allegedly took too active a part in trial by his questioning of witnesses, record established that such examination as had been made by judge had merely been for purpose of bringing out true facts of case and had not been beyond permissible range of judge's discretion. 18 U.S.C.A. §§ 793, 794.

9. Witnesses ⇨246(1)

Federal trial judge does not function as umpire or moderator, but sits to see that justice is done in cases heard before him, and it is his duty to see that case is presented in such manner as to be understood by jury, as well as by himself, and for such purpose he may question witnesses for purpose of disclosing and clarifying facts.

10. Criminal Law ⇨656(8)

A federal judge may comment outright on any portion of evidence and tell jury impression received by him as result thereof, provided that judge also advises jury that they are in no way bound by judge's expressions of opinion.

11. Criminal Law ⇨390

In prosecution for conspiracy to violate Espionage Act, allegedly committed when defendants combined to communicate

to Union of Soviet Socialist Republics documents, writings, sketches, notes and other information relating to National Defense of the United States, with intent and reason to believe that it would be used to advantage of Soviet Union, evidence that defendants had express preference to Russian social and economic organization over that of this country, was competent and relevant as bearing on possible motive for spying or possible intent to do so. 18 U.S.C.A. §§ 793, 794.

12. Criminal Law ⇨390

In prosecution for conspiracy to violate Espionage Act by furnishing information to Russia to her advantage and disadvantage of the United States, wherein witness testified that American Communist Party was part of, and subject to Communist International, that party received orders from Russia to propagandize, spy and sabotage, and that party members were compelled to go along with such order, evidence that defendants were members of Communist Party was admissible as tending to show motive or intent to aid Russia. 18 U.S.C.A. §§ 793, 794.

13. Criminal Law ⇨338(7)

Whether evidence of membership in Communist Party should be permitted to come into espionage trial and extent of such evidence to be admitted, is matter for carefully exercised judicial discretion of trial judge. 18 U.S.C.A. §§ 793, 794.

14. Criminal Law ⇨698(1)

Testimony of fellow conspirator in prosecution for violation of Espionage Act by furnishing secret information to Russia with requisite intent, when not objected to at trial as being inadmissible as hearsay, would thereafter be considered and accorded its natural probative effect, as if it were in law admissible. 18 U.S.C.A. §§ 793, 794.

15. Criminal Law ⇨386

In prosecution for conspiracy to violate Espionage Act by furnishing secret information to Russia with requisite intent, wherein witness had testified that certain defendant had said that certain woman who was go-between for Russian agents probably knew defendant, and another witness

stated that defendant told him that he had once talked to such woman on telephone, testimony of woman involved that she had received several telephone calls from person who called himself by first name of defendant and who disclosed, during talk, that he lived in area in which defendant, in fact, lived was properly admitted. 18 U.S.C.A. §§ 793, 794.

16. Criminal Law ⇨566

In prosecution for conspiracy to violate Espionage Act by furnishing secret information to Russia with requisite intent, wherein witness had testified that main defendant had said that certain woman who was go-between for Russian agents probably knew defendant, and another witness stated that defendant had told him that he had once talked to such woman on telephone, and such woman testified that she had received messages from person who had same first name as defendant and who she identified from conversation, as living in area in which defendant lived, evidence warranted jury inference that defendant was person who, by telephone, gave such woman information which was transmitted to Soviet agent. 18 U.S.C.A. §§ 793, 794.

17. Conspiracy ⇨48

In prosecution for conspiracy to violate Espionage Act by furnishing secret information to Russia with requisite intent, instruction that because of development of highly destructive weapons and their highly guarded possession by nations existing in state of tension with one another, enforcement of espionage laws takes a new significance, was not tantamount to license to trier of facts to yield to their emotional bias and return verdict of guilty regardless of evidence and was not error. 18 U.S.C.A. §§ 793, 794.

18. Criminal Law ⇨785(3)

In prosecution for conspiracy to violate Espionage Act by furnishing secret information to Russia with requisite intent, wherein defense counsel argued that testimony of witness for state should not be credited because same was given as part of understanding that witness' wife would not be prosecuted for similar offense and witness would receive relatively light sen-

tence in return therefor, instruction that jury should consider whether witnesses testified as result of business difficulties or for some other unknown reason, was not error as inaccurate characterization of defendants' argument, since judge had no duty to repeat all arguments of lawyers which jury had heard a short time previously and especially so when he had explicitly told jury that he could not cover all arguments. 18 U.S.C.A. §§ 793, 794.

19. Criminal Law ⇨371(1), 696(1)

In prosecution for conspiracy to violate Espionage Act by furnishing secret information to Russia with requisite intent, testimony of alleged co-conspirator, who was not named as defendant in present case, that certain defendant had admitted stealing proximity fuse from his place of employment and giving same to Russia, from which word "stealing" was stricken on objection, was admissible to show intent on defendant's part to aid Russia, and it was not error to refuse to strike all of such testimony. 18 U.S.C.A. §§ 793, 794.

20. Witnesses ⇨252

In prosecution for conspiracy to violate Espionage Act by furnishing secret information to Russia with requisite intent, wherein it appeared that co-conspirator, who was not on trial with defendants, had furnished sketches of lens mold and atom bomb to one of defendants, admission in evidence of reproduction sketch by such co-conspirator for purpose of illustrating witness' testimonial description of information imparted to defendants was not error, but such sketches would ordinarily be admissible under rule permitting witness to clarify his testimony by written illustration. 18 U.S.C.A. §§ 793, 794.

21. Criminal Law ⇨451(4)

In prosecution for conspiracy to violate Espionage Act by furnishing secret information to Russia with requisite intent, wherein co-conspirator of defendants, who was not on trial at present time, had reproduced sketch of lens mold and an atom bomb furnished to one of defendants and had testified in relation thereto, when there was no contention that sketches were exact replicas or the originals sent to Russia,

it was not error to permit co-conspirator's superiors to examine sketches and testify as to their accuracy, but same was permissible as comment upon substance or import of another witness' testimony.

22. Criminal Law ⇨859

Where jury, during deliberations in prosecution for conspiracy to violate Espionage Act, requested reading of that portion of testimony of state's witness covering certain period of time, and judge refused, unless asked to do so by jury, to grant defense counsel's request that cross-examination also be read for purpose of showing precise similarity indicating that testimony had been rehearsed, when jurors remained silent after having heard colloquy, refusal to have cross-examination read was within discretion of trial judge. 18 U.S.C.A. §§ 793, 794.

23. Criminal Law ⇨629

Under statute requiring list of witnesses to be supplied to defendants charged with treason or other capital offense, at least three days before commencement of trial, Government, in prosecution for conspiracy to violate Espionage Act, was not bound to have included in list of witnesses, name of witness whose identity was not discovered until after commencement of trial and whose testimony tended to refute defendant's denial that he had had passport photographs taken of his family on certain date. 18 U.S.C.A. §§ 793, 794, 3432.

24. Criminal Law ⇨629

Statute requiring list of witnesses to be produced on trial for proving indictment to be furnished to person charged with treason or other capital offense, at least three days before commencement of trial, was not intended to preclude United States from making use of any material testimony discovered during progress of trial, but merely requires that prosecuting officer shall in good faith furnish to prisoner, before trial, names of all witnesses then known to him and intended to be used at trial. 18 U.S.C.A. § 3432.

25. Conspiracy ⇨23

Distinction between single conspiracy and several related conspiracies is, whether there is single unified purpose, or con-

mon end, and ends similar in character which characterize multiple conspiracies.

26. Conspiracy ⇨47

In prosecution for conspiracy to violate Espionage Act, wherein one of alleged co-conspirators contended that there were multiple conspiracies and that he was not proved to be member of conspiracy to ship information to Russia, evidence established that there was but single conspiracy with common end consisting of transmission to Soviet Union of any and all information relating to national defense, and that particular defendant had consented to become member of such conspiracy. 18 U.S.C.A. §§ 793, 794.

27. Criminal Law ⇨1171(1)

In prosecution for conspiracy to violate Espionage Act by combining to transmit secret information relating to national defense to Soviet Union, wherein counsel for particular co-conspirator at end of trial acknowledged good behavior of prosecutor, record established that prosecutor had not been guilty of any misconduct prejudicial to such co-conspirator or which could have deprived him of fair trial. 18 U.S.C.A. §§ 793, 794.

28. Criminal Law ⇨338(7)

In prosecution for conspiracy to violate Espionage Act by delivering secret information to Russia, wherein Government's theory was that certain co-conspirator had fled to Mexico to escape prosecution, introduction in evidence as entry in regular course of card made by Immigration Inspector at time co-conspirator had re-entered the United States, which stated that co-conspirator had been deported from Mexico, was proper and not objectionable as being irrelevant since it tended to preclude jury inference that co-conspirator had returned voluntarily to stand trial. 18 U.S.C.A. §§ 793, 794; 28 U.S.C.A. §§ 1732, 1733.

29. Criminal Law ⇨344

Card made by Immigration Inspector showing that person had re-entered United States and had been deported from Mexico was admissible in evidence under statute relating to records made in regular course of business, when inspector was required as

case of every deportee from Mexico, and when inspector, who made entry, testified at trial and was available for cross-examination as to extent of his observations and his reasons for making entry. 28 U.S.C.A. §§ 1732, 1733.

30. Criminal Law ⇨968(4)

In prosecution for conspiracy to violate Espionage Act in which one of charged co-conspirators contended that he had been illegally abducted by Mexican police from his residence in Mexico City and taken across border into the United States and delivered into immediate custody of United States agents, and that conviction was thereby nullity, failure of such defendant to make pre-trial motion challenging jurisdiction over his person when all such information was known to defendant, and failure, when Government introduced evidence showing legal deportation, to show facts of alleged illegal abduction, precluded assertion of such matters by motion in arrest of judgment entered. Fed.Rules Crim.Proc. rules 12(b) (2), 34, 18 U.S.C.A.; 18 U.S.C.A. § 794(b, c).

31. Criminal Law ⇨968(4), 970(1)

Motions in arrest of judgment are allowed under Rules of Criminal Procedure only when indictment charges no offense, or court had no jurisdiction over offense charged. Fed.Rules Crim.Proc. rules 12(b) (2), 34, 18 U.S.C.A.; 18 U.S.C.A. § 794(b, c).

32. Criminal Law ⇨105

Personal jurisdiction may be waived in criminal case as well as in civil case.

33. War and National Defense ⇨35

Congress possesses power to prescribe death penalty for wartime espionage. Fed. Rules Crim.Proc. rules 12(b) (2), 34, 18 U.S.C.A.; 18 U.S.C.A. § 794(b, c).

34. Criminal Law ⇨1183

Under federal criminal practice, federal court has no control over sentence of trial court, which is within limits permitted by statute, and could not reduce death penalty sentence for wartime violation of Espionage Act. 18 U.S.C.A. §§ 793, 794(b, c); Fed.Rules Crim.Proc. rules 12(b) (2), 34, 18 U.S.C.A.

35. Conspiracy $\Rightarrow$ 47

Offense described by provision of Espionage Act prohibiting communication of restricted information to advantage of any foreign nation, without regard to whether such other nation be friend or enemy, is distinct from crime of treason as defined by Constitution, and parties under trial for conspiracy to violate Espionage Act were not entitled to constitutional safeguards peculiar to prosecutions for treason. U.S. C.A.Const. art. 3, § 3.

36. Criminal Law $\Rightarrow$ 1213

Fact that trial for conspiracy to violate Espionage Act was not attended by constitutional safeguards applicable to treason, for which death penalty is authorized, did not render imposition of death penalty for such conspiracy cruel and unusual punishment. 18 U.S.C.A. § 794(b); U.S.C.A. Const. Amend. 8.

On January 31, 1951, the grand jury indicted Julius and Ethel Rosenberg, David Greenglass, Anatoli Yakolev and Morton Sobell for conspiring between 1944 and 1950 to violate 50 U.S.C. § 32¹ by combining to communicate to the Union of Soviet Socialist Republics documents, writings, sketches, notes and information relating to the national defense of the United States, with intent and reason to believe that they would be used to the advantage of the Soviet Union. Harry Gold and Ruth Greenglass were named in the indictment as conspirators but not as defendants, and a severance for trial purposes was granted

as to David Greenglass, who pleaded guilty, and as to Anatoli Yakolev. The indictment listed ten overt acts done in furtherance of the conspiracy, including the receipt by Julius Rosenberg from Ruth Greenglass of a paper containing written information after a trip by Ruth to New Mexico, and the additional receipt by Julius from David Greenglass of a paper containing sketches of experiments conducted at the Los Alamos Project. Defendant Sobell made a motion for a bill of particulars. The government's answering affidavit charged Sobell with five overt acts made in furtherance of the conspiracy, all consisting of "conversations" with Julius Rosenberg on various dates. The trial of the defendants, Julius and Ethel Rosenberg and Morton Sobell, in the United States District Court for the Southern District of New York, lasted fourteen days.

At the trial, witnesses for the government testified to the following: In November 1944, Ruth Greenglass planned a visit to her husband, David, stationed as a soldier in the Los Alamos atomic experimental station. Before her visit, Ethel and Julius Rosenberg, sister and brother-in-law of David Greenglass, urged Ruth to obtain from David specific information concerning the location, personnel, physical description, security measures, camouflage and experiments at Los Alamos. Ruth was to commit this information to memory and tell it to Julius upon her return to New York, for ultimate transmittal to the Soviet Union. David, reluctant at first, agreed to give Ruth the information Julius had requested. He told her the location and security measures of the station, and the

directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: Provided, That whoever shall violate the provisions of subsection (a) of this section in time of war shall be punished by death or by imprisonment for not more than thirty years * * * 50 U.S.C. § 32 is now contained in the revised Title 18, § 794.

names of leading scientists working there. When David returned to New York in 1945 on furlough, he wrote out a fuller report on the project for Julius, and sketched a lens mold used in the atomic experiment. A few nights later, at the Rosenberg home, the Greenglasses were introduced to Mrs. Sidorovich whom Julius explained might be sent as an emissary to collect information from David in New Mexico. It was agreed that whoever was sent would bear a torn half of the top of a Jello box which would match the half retained in Ruth's possession. Ethel Rosenberg, at this time, admitted her active part in the espionage work Julius was carrying on, and her regular typing of information for him. Julius introduced David to a Russian, who questioned David about the atomic-bomb operation and formula. In June 1945, Harry Gold arrived in Albuquerque with the torn half of the Jello box and the salutation, "I come from Julius." He had been assigned to the mission by Yakolev, his Soviet superior, and had, the day before his trip, met, pursuant to Yakolev's command, with Emil Fuchs, British scientist and Russian spy working at Los Alamos. David delivered to Gold information about personnel in the project who might be recruited for espionage, and another sketch of the lens mold, showing the basic principles of implosion used in the bomb construction. Gold relayed the information to Yakolev. On a revisit of the Greenglasses to New York, David turned over a sketch of the cross-section and a ten-page exposition of the bomb to Rosenberg. Ethel typed up the report, and, during this meeting, Julius admitted he had stolen a proximity fuse from a factory, and had given it to Russia. After the war, David went into business—a small machine-shop—with Julius, and Julius several times offered to send David to college on Russian money. Julius confided to David that he was helping the Russians subsidize American students, that he had contacts in New York and Ohio, and supplied information for siphoning to Russia, that he transmitted information to Russia on microfilm equipment, and that he received rewards for his services from the Russians in money and gifts. In 1950, Julius came to

David and told him to leave the country immediately, since Dr. Fuchs, one of Gold's collaborators, had been arrested; he, Julius, would supply the money and the plan to get to Russia. A month later, after Gold's arrest, Julius repeated the warning to flee, adding that he and his family intended to do likewise, and giving David \$1,000. Julius said his own flight was necessitated by the fact that Jacob Golos, already exposed as a Soviet agent, and Elizabeth Bentley, probably knew him. Julius said he had made several phone calls to her and that she had acted as a go-between for him and Golos. Julius gave David an additional \$4,000 for the trip. Julius had passport photos taken, telling the photographer that he and his family planned to leave for France. After David's arrest for espionage, Ethel asked Ruth to make David keep quiet about Julius and take the blame alone, since Julius had been released after admitting nothing to the F. B. I. In 1944, Julius several times solicited Max Elitcher, a Navy Department engineer, to obtain anti-aircraft and fire-control secrets for Russia, and in 1948 asked him not to leave his Navy Department job because he could be of use there in espionage. A month or so later Elitcher accompanied Sobell to deliver "valuable information" in a 35-millimeter can to Julius.

According to the government's witnesses, Sobell, a college classmate of Rosenberg's suggested to Rosenberg that Elitcher would be a good source of espionage information, and he, Sobell, later joined Julius, in urging Elitcher not to leave the Navy Department. According to Julius, Sobell regularly delivered information for transmittal to Russia. Sobell (as noted above) delivered "valuable information" to Julius on an emergency midnight ride after learning that Elitcher was being followed by the F. B. I. He asked Elitcher for a fire-ordinance pamphlet and for the names of young engineers who might supply military information to the Russians. In 1950, Sobell fled to Mexico, used various aliases there, and made inquiries about leaving Mexico for other countries. He was, however, deported from Mexico to the United States.

1. So far as pertinent, it reads as follows: (a) "Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either

The Rosenbergs took the stand and testified as follows: They had never solicited the Greenglasses for atomic information or participated in any kind of espionage work for Russia. Julius denied stealing a proximity fuse. He did not, he said, ever know Harry Gold or call Elizabeth Bentley. He admitted that he and David went into business together after the war, but said they did not enjoy good business relations. In 1950, David, according to Julius, excited, asked Julius to get a smallpox vaccination certificate from his doctor and to find out what kind of injections were necessary for entrance into Mexico. Ruth had told Julius that David stole things while in the Army, and Julius thought David was in trouble on this account. David asked for a few thousand in cash and, when Julius refused, told Julius he would be sorry. Julius denied that he gave David any money to flee, or had any passport pictures of his own family taken preparatory to flight. He never discussed anything pertaining to espionage with either Sobell or Elitcher although he saw both socially. In short, the Rosenbergs denied any and every part of the evidence which the government introduced in so far as it connected them with Soviet espionage. Sobell did not take the stand but he pleaded not guilty. At the end of the trial, the jury found the three defendants guilty as charged. The trial judge sentenced the Rosenbergs to death, and Sobell to thirty years' imprisonment.

Myles J. Lane, New York City (Roy M. Cohn, James B. Kilsheimer 3d and Stanley D. Robinson, all of New York City, of counsel), for United States of America.

Emanuel H. Bloch, New York City, for Julius Rosenberg and Ethel Rosenberg.

1. In *United States v. Heine*, 2 Cir., 151 F.2d 813, 815, after stating that the words "to the advantage of a foreign nation", inserted while the statute was in process, "greatly enlarged its scope", we went on to say: " * * * for while it is true that it is somewhat hard to imagine instances in which anyone would be likely to transmit information 'relating to the national defense,' which would be injurious to the United States, and yet not advantageous to a foreign power, it

Harold M. Phillips and Edward Kuntz, New York City (Howard N. Meyer, New York City, of counsel), for Morton Sobell.

Before SWAN, Chief Judge, and CHASE and FRANK, Circuit Judges.

FRANK, Circuit Judge.

Since two of the defendants must be put to death if the judgments stand, it goes without saying that we have scrutinized the record with extraordinary care to see whether it contains any of the errors asserted on this appeal.

[1] 1. The Supreme Court has held that the Espionage Act of 1917 makes criminal, and subject to the prescribed penalties, the communication of the prohibited information to the advantage of "any foreign nation," even if such communication does not injure this country. See *Gorin v. United States*, 312 U.S. 19, 29-30, 61 S.Ct. 429, 435, 85 L.Ed. 488, where the Court said: "Nor do we think it necessary to prove that the information obtained was to be used to the injury of the United States. The statute is explicit in phrasing the crime of espionage as an act of obtaining information relating to the national defense 'to be used * * * to the advantage of any foreign nation.' No distinction is made between friend or enemy. Unhappily the status of a foreign government may change. The evil which the statute punishes is the obtaining or furnishing of this guarded information, either to our hurt or another's gain."¹ Accordingly, the trial judge, in the case at bar, properly instructed the jury as follows: "I charge you that whether the Union of Soviet Socialist Republics was an ally or friendly nation during the period of the alleged conspiracy is immaterial, and you are

it is possible to think of many cases where information might be advantageous to another power, and yet not injurious to the United States. The section as enacted necessarily implies that there are some kinds of information 'relating to the national defense' which must not be given to a friendly power, not even to an ally, no matter how innocent, or even commendable, the purpose of the sender may be."

not to consider that at all in your deliberations."

[2] In *United States v. Heine*, 2 Cir., 151 F.2d 813, we so interpreted the statute as to make it inapplicable to information which our armed forces had consented to have made public. The defendants now assert that the indictment, which followed the language of the statute, was fatally defective since it did not allege that the matter there described was not public. But the statutory language necessarily imported its correct judicial interpretation. Consequently the indictment was sufficient under Rule 7(c) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., which provides: "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. * * * The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated."²

[3] In the *Gorin* case, the Supreme Court rejected the contention of the unconstitutionality of the statute on the ground of its vagueness under the due process clause of the Fifth Amendment. By implication, it sustained the validity of the statute against any identical argument of vagueness, such as the one urged here, under the Sixth Amendment, since the Court's decision was primarily concerned with whether the statute set up definite enough standards of guilt to advise a citizen of what exactly was forbidden and *ipso facto* a potential defendant of what

2. Rule 7(f) says: "The court for cause may direct the filing of a bill of particulars." The Rosenbergs, like Sobell, might have requested such a bill if they were really confused as to whether or not they were charged with transmitting secret information. One of the overt acts charged in the indictment covered the reception by Julius of sketches of the experiment conducted at the Los Alamos project, a good indication that the material involved was secret.

3. The defendants argue that the *Gorin* case is not binding here, even on the due-process argument, because that case

exactly he was charged. Court said [312 U.S. 19, 61 S.Ct. 433]: "But we find no uncertainty in this statute which deprives a person of the ability to predetermine whether a contemplated action is criminal under the provisions of this law. The obvious delimiting words in the statute are those requiring 'intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation.' This requires those prosecuted to have acted in bad faith. The sanctions apply only when scienter is established. * * * Finally, we are of the view that the use of the words 'national defense' has given them, as here employed, a well understood connotation. * * * National defense, the Government maintains, 'is a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.' We agree that the words 'national defense' in the Espionage Act carry that meaning. * * * The language employed appears sufficiently definite to apprise the public of prohibited activities and is consonant with due process."³

[4,5] We think the statute valid under the First Amendment as well. The communication to a foreign government of secret material connected with the national defense can by no far-fetched reasoning be included within the area of First-Amendment protected free speech. As interpreted in the *Gorin* case, the statute forbids nothing except such communication. The Court's decision that the stat-

"was decided under a concession of validity of the intent clauses which enabled the court to hold that they cured the unconstitutional vagueness of the criminal standard." We find nothing in the decision indicating any "concession of validity of the intent clauses." The attack was as broad as the concept of Fifth-Amendment due process. Nor do we think the Supreme Court, in sustaining the constitutionality of so important a statute, would rely on clauses valid only by concession, without examining those clauses themselves for constitutional vulnerability.

ute was definite enough to tell citizens what was prohibited satisfies appellants' contention that many legitimate exercises of First-Amendment rights will fall within the language of the statute. The Court said, "This requires those prosecuted to have acted in bad faith. The sanctions apply only when scienter is established." Stripped down, defendants' First-Amendment argument is the same as their argument under the Fifth and Sixth—i. e., vagueness—and we think the Supreme Court has answered that argument. "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines v. United States*, 342 U.S. 327, 72 S.Ct. 329, 330.⁴

[6] 2. The defendants, in their briefs and oral arguments in this court, have attacked the reliability of the damaging testimony given against them by the government's chief witnesses who are all self-confessed spies, and particularly the credibility of the testimony of the Greenglasses, one of whom the government has not prosecuted

and the other of whom received a relatively mild sentence. Doubtless, if that testimony were disregarded, the conviction could not stand. But where trial is by jury, this court is not allowed to consider the credibility of witnesses or the reliability of testimony. Particularly in the federal judicial system, that is the jury's province.

[7] The jury here were warned by the trial judge as follows: "As to the testimony of David Greenglass, Ruth Greenglass and Harry Gold, you must consider it carefully and act upon it with caution, for they are accused of being accomplices. An accomplice in this case is anybody that the prosecution charges agreed or confederated with any or all of the defendants in the commission of the crime charged, as alleged in the indictment. I am not saying that, because a person is a co-conspirator or an accomplice, he or she is not to be believed. If this were so, many cases in this court could not be proven. In the Federal Court a defendant can be convicted upon the uncorroborated testimony of an accomplice whose testimony satisfies the jury of the defendant's guilt beyond a reasonable doubt." So instructed, the jury found defendants guilty. Faced with such a verdict, this court is obligated to assume that the jury believed the evidence unfavorable to the defendants. On that assumption, the evidence to sustain the verdict is more than ample.

[8] 3. Defendants, however, tell us that the trial judge behaved himself so improperly as to deprive them of a fair trial. Defendants' counsel first broached this suggestion on a motion for mistrial after all the evidence had been heard, said that

quire, urge petitioners, the clearest sort of declaration by the Congress to bring under the statute the obtaining and delivering to a foreign government for its advantage of reports generally published and available * * *." Our court said in *United States v. Heine*, supra [151 F.2d 815], "Obviously, so drastic a repression of the free exchange of information it is wise carefully to scrutinize, lest extravagant and absurd consequences result."

the judge's alleged fault had been " inadvertent," and added that the judge had "been extremely courteous to us and afforded us lawyers every privilege that a lawyer should expect in a criminal case." Soon after the denial of this motion, counsel for the Rosenbergs, summing up for the jury, stated that "we feel that the trial has been conducted * * * with that dignity and that decorum that befits an American trial." Still later, the same counsel said that "the court conducted itself as an American judge." These remarks, by a highly competent and experienced lawyer, are not compatible with the complaints now made. Nor are those complaints deserved. We think the judge

5. (1) *Alleged emphasizing of key points of the Government's case:*

Dorothy Abel, Ruth's sister, was under cross-examination as to specific declarations allegedly made by Julius in her presence with respect to the United States and the Soviet Union. The witness had replied that Julius criticized our Government because it was "capitalistic * * * that is about all I can remember." The following occurred:

"Mr. E. H. Bloch: What else?"

"The Court: Is that the reason they assigned for preferring the Russian form of government?"

"The Witness: Yes.

"The Court: Was there discussion of the relative merits of the capitalistic form of government as against communistic form?"

(2) *Alleged protecting and rehabilitating of Government witnesses:*

Elitcher had failed to record on his direct examination his presence at Julius' home in the week of Christmas, 1946, although he had been asked, in chronological approach, his meetings with Julius. The cross-examiner:

"Question: You forgot about that?"

"The Court: He wasn't asked about it if I remember and it might have been nothing to the Government's case. There is a certain inference in your question that he deliberately withheld it."

Ruth was being examined on the Jello box side she allegedly obtained from Julius and kept for many months to match with the other side produced by Gold. When pressed to describe the printing or words on this Jello box side, she answered that her lack of knowledge of details "was not pertinent." The interlocutor's motion to strike the answer

stayed well inside the discretion allowed him.

[9,10] He is charged mainly with taking too active a part in the trial process by his questioning of witnesses. By this questioning he is alleged to have (1) emphasized key points of the government's case; (2) protected and rehabilitated government witnesses; (3) commented on evidence as immaterial or dismissed contradictions brought out by defense attorney as not very important or convincing; (4) examined the defendants with hostility. We have carefully examined each of the hundred or so incidents cited by defendants. Several representative incidents are set out in the footnote.⁵ In general, we

was granted and the witness admitted she had not looked at the object in her possession.

"The Court: Now let me ask you this: what was important to you?"

The witness replied that her interest was confined to the use of the Jello box side as an identification medium to be matched with the expected courier's other side of the box.

"The Court: Excuse me, when the bearer of the other half of that side of the Jello box was to come to you, was it your primary purpose in seeing whether the two sides would fit together like a jig-saw puzzle?"

"The Witness: Yes.

"The Court: Very well."

(3) *Alleged improper comments on evidence:*

Ruth, on cross-examination, was directed to go over her conversation with the Rosenbergs in November 1944. The cross-examiner, for the purpose of showing the witness was rehearsed, asked whether the witness' recounting of the incident was not a verbatim repetition of her direct testimony. The prosecutor objected; the following was the ruling:

"The Court: Your objection is sustained. I don't know exactly what the point is. If the witness has left out something, Mr. Bloch would say the witness didn't repeat the story accurately, and the witness repeats it accurately and apparently that isn't good."

(4) *Alleged hostile examination of defendants:*

By the Court:

"What were your own views about the subject matter of the United States having any weapon that Russia didn't have at that time? That is, in 1944 and

can find no purpose in the judge's questioning except that of clarification. If, with that purpose, he gave witnesses who had contradicted themselves a chance to resolve that conflict, and took away defendants' temporary advantage with the jury, it was an unavoidable incident of his unchallenged power to bring out the facts of the case. See, e. g., *Simon v. United States*, 4 Cir., 123 F.2d 80, 83, certiorari denied 314 U.S. 694, 62 S.Ct. 412, 86 L.Ed. 555: "It cannot be too often repeated, or too strongly emphasized, that the function of a federal trial judge is not that of an umpire or of a moderator at a town meeting. He sits to see that justice is done in the cases heard before him; and it is his duty to see that a case on trial is presented in such way as to be understood by the jury, as well as by himself. He should not hesitate to ask questions for the purpose of developing the facts; and it is no ground of complaint that the facts so developed may hurt or help one side or the other. In no case is the exercise of this power of the judge more important than in one like this, involving, as it does, lengthy circumstantial testimony, the force of which may be lost upon the jury if it is not properly presented or if its salient features are not called to the jury's attention at the time. The judge is the only disinterested lawyer connected with the proceeding. He has no interest except

1945. A. I don't recall having any views at all about it.

"Q. Your mind was a blank on the subject. * * * There were never any discussions about it at all? A. Not about that, not about the weapon.

"Q. Was there any discussion at all as to any advantages which the United States had to make warfare that the Russians didn't have? A. No, nothing of that sort.

"Q. You never heard any discussions that there should be equalization between Russia and the United States? A. No, sir."

Julius had expressed to Ethel his belief that David was attempting to "blackmail" him when David's request to him for money in May or early June, 1950 was rejected and David had warned Julie "I just got to have that money and if you don't get me the money you are going to be sorry."

to see that justice is done. It is a more important duty than to see that the facts are properly developed and that their bearing upon the question at issue are clearly understood by the jury." If some of his questions and comments indicated his opinion of the merits of counsel's attack or of the witnesses' testimony, it cannot be said that he committed reversible error, since, unlike judges in many of our state courts, a federal judge may comment outright on any portion of the evidence, telling the jury how it struck him, whom he believed, or disbelieved, and the like, provided only that he advises the jury that they are in no way bound by his expressions of such views. *United States v. Aaron*, 2 Cir., 190 F.2d 144, 146-147; *United States v. Chiarella*, 2 Cir., 184 F.2d 903, 908; reversed on government's confession of error 341 U.S. 946, 71 S.Ct. 1004, 95 L.Ed. 1370; *Pfaff v. United States*, 7 Cir., 85 F.2d 309, 311; *United States v. Warren*, 2 Cir., 120 F.2d 211, 212; *Ochoa v. United States*, 9 Cir., 167 F.2d 341, 344; *Herron v. Southern Pacific Co.*, 283 U.S. 91, 95, 51 S.Ct. 383, 75 L.Ed. 857; *Glasser v. United States*, 315 U.S. 60, 82, 62 S.Ct. 457, 86 L.Ed. 680.

Here the trial judge said in his charge: "No matter how careful a judge may be to avoid it, there is always the possibility that the jury or some particular juror may get an impression that the judge has some

The Court:

"Q. Blackmail you. When did he try to blackmail you? A. Well, he threatened me to get money. I considered it blackmailing me.

"Q. What did he say he would do if you didn't give it to him? You said he said you would be sorry. A. Yes. I consider it blackmail when somebody says that.

"Q. Did he say what he would do to you? A. No, he didn't.

"Q. Did he say he would go to the authorities and tell them you were in a conspiracy with him to steal the atomic bomb secret? A. No.

"Q. Do you think that was what he had in mind? A. How could I know what he had in mind.

"Q. What do you mean by blackmail then? A. Maybe he threatened to punch me in the nose or something like that."

opinion with reference to the innocence of the defendants, or that he thinks that some particular phase of the case is more important than another, or that some particular witness is more credible than another, or that a certain inference of fact should not be made and so on. If you have formed any such impression you must put it out of your mind and utterly disregard it. Nothing I have said during the trial nor in these instructions was intended to give any such impression; nor were any remarks or questions addressed to any of the witnesses or to counsel so intended. On the contrary, I have been scrupulously careful to avoid any comment which might even remotely suggest that I considered the subjects of the weight of testimony, the credibility of witnesses, the inferences to be drawn or the relative importance of one segment of the evidence as against another, of the determination of the guilt or innocence of the defendants, as coming within the orbit of any of my functions as the presiding Judge in this trial. And so I tell you again, you are the sole and exclusive judges of the facts of this case; you, and you alone, will pass upon the credibility of all the witnesses, all in accordance with the instructions on that subject, which I shall give you later. Despite anything said by me or by counsel, your recollection of the testimony must prevail whenever your recollection differs from what I have said or what counsel for either side have said in argument or otherwise; it is for you to determine what the proofs adduced by both sides disclose, regardless of anything said by me in the brief and necessarily incomplete summaries which I have given you of the contentions of the parties; and it is for you and you alone to weigh the proofs, draw such inferences of fact therefrom as you determine should be drawn and to decide each and every one of the issues of fact in the case."

[11] 4. Evidence was introduced to the effect (1) that the defendants expressed a preference for the Russian social and economic organization over ours, and (2) that the defendants were members of

this evidence was incompetent to show they would commit espionage for Russia, and that it improperly inflamed the jury against them. We think the evidence possessed relevance. An American's devotion to another country's welfare cannot of course constitute proof that he has spied for that other country. But the jurors may reasonably infer that he is more likely to spy for it than other Americans not similarly devoted. Hence this attitude bears on a possible motive for his spying, or on a possible intent to do so when there is other evidence in the case that he did such spying. We have held such testimony admissible in a similar case involving espionage for Nazi Germany. *United States v. Molzahn*, 2 Cir., 135 F.2d 92, 97, certiorari denied 319 U.S. 774, 63 S.Ct. 1440, 87 L.Ed. 1721. See also *Haupt v. United States*, 330 U.S. 631, 642, 67 S.Ct. 874, 91 L.Ed. 1145.

[12] Communist Party membership presents a somewhat more complicated problem than pro-Soviet statements. The government had to prove that the Communist Party was tied to Soviet causes in order to make membership in it meaningful as evidence of motive or intent to aid Russia. Early in the trial, the trial judge so cautioned the jury: "I want you to understand right at the outset that the fact that they were members of the Communist Party does not establish the elements necessary to prove them guilty of the crime charged in this indictment which is conspiracy to commit espionage. * * * The government will have to establish that there is some connection between communism and committing the offense charged in the indictment." To that end, the government put Elizabeth Bentley on the stand. She testified that the American Communist Party was part of, and subject to, the Communist International; that the Party received orders from Russia to propagandize, spy, and sabotage; and that Party members were bound to go along with those orders under threat of expulsion. If the jury believed her, she supplied the missing link connecting the Communist Party with the Soviet Union, and

making Communist Party membership probative of motive or intent to aid Russia.⁶

[13] Of course, such evidence can be highly inflammatory in a jury trial. This court and others have recognized that the Communist label yields marked ill-will for its American wearer. See, e. g., *Grant v. Readers Digest Association*, 2 Cir., 151 F.2d 733; *Mencher v. Chesley*, 297 N.Y. 94, 100, 75 N.E.2d 257. Whether and how much of that kind of evidence should come into a trial like this is a matter for carefully-exercised judicial discretion. We think the trial judge here did not abuse that discretion. Each time Party membership was alluded to, and again in his final charge, the judge cautioned the jurors "not to determine the guilt or innocence of a defendant on whether or not he is a Communist." It may be that such warnings are no more than an empty ritual without any practical effect on the jurors; see Mr. Justice Jackson in *Krulewitch v. United States*, 336 U.S. 440, 453, 69 S.Ct. 716, 93 L.Ed. 790.⁷ If so, this danger is one of the risks run in a trial by jury; and the defendants made no effort to procure a trial by a judge alone, under Criminal Rule 23(a).

5. Early in the trial Elitcher testified that he had accompanied Sobell on a hurried ride to the Rosenbergs to deliver "valuable" information to Julius. This ride was precipitated by Elitcher's suspicion, recounted to Sobell, that he, Elitcher, was

being followed. Elitcher testified about Sobell as follows: "I turned to him and said, 'Well, what does Julie think about this, my being followed?' He said 'It is all right; don't be concerned about it; it is O. K.' He then said Rosenberg had told him that he once talked to Elizabeth Bentley on the phone but he was pretty sure she didn't know who he was and therefore everything was all right."

[14] Defendants at the trial neither objected to this testimony nor moved to strike it. They now contend that it was inadmissible hearsay. The government contends that it was not hearsay since it was a report of a statement by Sobell, one of the Rosenbergs' fellow-conspirators, about something Rosenberg said in furtherance of the conspiracy. If we assume that this contention is not sound,⁸ nevertheless the jury was properly allowed to consider this testimony. For, as the Supreme Court has held as to hearsay testimony: "If evidence of this kind is admitted without objection, it is to be considered, and accorded its natural probative effect, as if it were in law admissible." *Spiller v. Atchison, T. & S. F. Ry. Co.*, 253 U.S. 117, 130, 40 S.Ct. 466, 472, 64 L.Ed. 810; *Diaz v. United States*, 223 U.S. 442, 450, 32 S.Ct. 250, 56 L.Ed. 500; *Schlemmer v. Buffalo, Rochester & P. Ry. Co.*, 205 U.S. 1, 8, 9, 27 S.Ct. 407, 51 L.Ed. 681; *Dowling v. Jones*, 2 Cir., 67 F.2d 537, 539. The federal authorities are unanimous on this point.⁹

ment was made to calm him down so that he might be willing in the future to contribute.

9. True, we may, of our own motion, notice egregious errors to which there were no objections below, if they "seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Johnson v. United States*, 313 U.S. 189, 200-201, 63 S.Ct. 549, 555, 87 L.Ed. 704; Criminal Rule 52(b). That exception might conceivably govern here if we believed the failure to object to this testimony resulted from the incompetence of defendants' counsel. But the record shows that defendants' counsel were singularly astute and conscientious. We know, too, that an able trial lawyer, for one or more of a variety of reasons, will often withhold an objection to the recep-

tion of hearsay. When he has done so, and it turns out that the jury's verdict is adverse to his client, the lawyer may not assert that reception as error.

[15] Greenglass had said Miss Bentley probably knew him. The jury was therefore entitled to believe, on the basis of Elitcher's and Greenglass' testimony that Julius had spoken on the phone to Miss Bentley. In those circumstances, we see no error in permitting Miss Bentley to testify, over defendants' objections, as follows: She received several phone calls in 1943 from a man who called himself "Julius"—whose voice she did not recognize. She would then call Golos, a top Russian spy, and give him Julius' messages—acting as a go-between for "Julius" and Golos. From her talks with "Julius" and Golos, she learned that "Julius" lived in Knickerbocker Village—where, in fact, Rosenberg lived.

[16] The testimony of Elitcher and Greenglass supplied sufficient circumstantial evidence to make it proper to allow the jury to infer that it was Julius Rosenberg, the defendant who, by phone, gave Miss Bentley the information she passed on to Golos. *Jarvis v. United States*, 1 Cir., 90 F.2d 243, certiorari denied 302 U.S. 705, 58 S.Ct. 25, 82 L.Ed. 544; 7 Wigmore, Evidence, sec. 2155. Moreover, according to Greenglass' testimony, Julius Rosenberg told the Greenglasses that an emissary would contact them in New Mexico bearing greetings from himself, Julius; Harry Gold testified that, by command of Yakolev, another spy, he, Harry Gold, bore the greeting, "I come from Julius," when he met up with the Greenglasses, per arrangement, in Albuquerque. The trial judge, of course, told the jury that they were free to accept or reject the inference that it was Rosenberg who called Miss Bentley.

[17] 6. The trial judge instructed the jury: "Because of the development of highly destructive weapons and their highly guarded possession by nations existing in a state of tension with one another, the enforcement of the espionage laws takes on a new significance. Our national well-

tion of hearsay. When he has done so, and it turns out that the jury's verdict is adverse to his client, the lawyer may not assert that reception as error.

ing on the secrets of our defense." Concerning this statement defendants argue: "The mandate to the jury to correlate the tensions of the times with the 'new significance' to enforce the espionage laws was not only an irrelevance, but licensed the triers of the facts to yield to their emotional bias and insinuated that it would be a reflection on their responsibility as patriotic citizens if they returned a verdict other than 'guilty.'" We do not agree. For the judge also said that he did "not mean that the mere allegation or use of the word 'espionage' should justify convicting innocent persons"; and he cautioned the jurors that it was their duty "to approach [the] task of determining the issues with * * * minds completely barren of prejudice or sympathy," to "weigh the evidence in this case calmly and dispassionately * * *." It can hardly be seriously contended that commenting on the "new significance" of espionage law enforcement gave the jury a green light to convict on emotions rather than evidence.

[18] 7. In summing up, Rosenberg's counsel argued to the jury that the Greenglasses' testimony should not be credited because they testified as part of an understanding with the prosecutor that Ruth Greenglass would not be prosecuted and that David Greenglass would receive a relatively light sentence. When, soon after the jury heard this argument, the judge instructed the jury, he said they should consider whether the Greenglasses testified as a result of business difficulties,¹⁰ "or for some other unknown reason." It is urged that, as this statement inaccurately characterized defendants' argument, it constitutes error. We think not. The judge had no duty to repeat all the lawyers' arguments which the jury had heard a short time before. He explicitly told the jury that he could not cover all of the arguments made by both sides in their summations, and that his reference to some portions of evidence and not others "should

10. There was testimony as to such difficulties.

not be taken as * * * any indication as to [his] opinion of the comparative importance or weight of that particular evidence." In addition, he explained (as we have already noted) that the Greenglasses were accomplices, and that their testimony must be carefully examined for that reason.

[19] 8. David Greenglass testified that Julius admitted "stealing" a proximity fuse from the Emerson Radio Company where he worked, and giving the fuse to Russia. On objection by defendants to the word "stealing," the court ordered it stricken. Defendants complain of the denial of their motions to strike all this testimony. They urge it was irrelevant since it was not shown that the proximity fuse was either secret or connected with national defense. The proximity fuse, be it noted, was an important World War II development which vastly increased the potential damage range of exploding shells. The nature of the device itself strongly suggests that it was secret, and unequivocally shows that it was connected with the national defense. At any rate, the testimony was admissible to show an intent on Julius' part to aid Russia.

[20,21] 9. The Rosenbergs contend that four Government exhibits (2, 6, 7 and 8), consisting of sketches made by David Greenglass of lens molds and an atom bomb were improperly admitted in evidence. Exhibits 2 and 8 are diagrams of a clover-leaf type high explosive lens mold used in atomic bomb experiments and a cross-section of an atom bomb, respectively. David Greenglass testified that these diagrams, which he reproduced for use at the trial, were accurate replicas of sketches given by him to Julius Rosenberg in 1945, and last seen by him at that time. Greenglass further testified that Exhibits 6 and 7 were accurate representations of lens mold sketches which he turned over to Harry Gold, in conjunction with a report on atomic experimentation, in June, 1945. The original sketches were allegedly delivered to Yakolev by Gold and transmitted to the Soviet Union. Greenglass explained all four exhibits to the jury and used them to illustrate his testimonial de-

scription of the information he imparted to Rosenberg and Gold. Such sketches would ordinarily be admissible under the "map, diagram, and chart" rule which permits a witness to clarify his testimony by written illustration, so as to communicate complicated or confusing information more easily to the jury. *Golden Eagle Farm Products v. Approved Dehydrating Co.*, 2 Cir., 147 F.2d 359. Defendants also object because David's superiors at Los Alamos were allowed to examine these sketches and to testify that they were reasonably accurate portrayals of the lens mold and atomic mechanisms used in the experimental station. We see no error here. A witness may always comment upon the substance or import of another witness' testimony; there is no reason to differentiate between verbal and nonverbal testimony in this respect. At no time were the sketches held out as those actually transmitted by Greenglass to Russia or exact replicas or copies thereof. They represented only Greenglass' recollection of what he had given the foreign agents. Hence there was no infraction of the secondary evidence rule.

[22] 10. The jury, during its deliberations, asked for a reading of that part of Ruth Greenglass' testimony covering the period from the time Rosenberg first approached her for espionage to the return of her husband to New York in 1945. Out of the jury's presence, defense counsel then asked the judge to have read to the jury the cross-examination covering the same period. The judge said he would not, without an express request from the jury. After the direct had been read to the jury, the judge asked them if they had what they wanted, and they said yes. Defense counsel, then, in the jurors' presence, again requested that the cross-examination be read. The judge at once replied that he would read only what the jury asked for. The jurors remained silent. Defense counsel objected. They now argue that the failure to comply with their request was prejudicial error. We think not. We think that the jury understood from the colloquy that the cross would be read if the jurors so desired, and that their

silence meant they had no such desire. Indeed, defendants' own argument bears this out: They do not assert that the failure to read the cross was harmful because the cross contradicted or markedly differed from the direct, but, on the contrary, because it repeated the direct almost word for word, so that (say defendants) the jury, had it heard the cross, might have concluded that the testimony was a rehearsed falsehood. However, but a short time previously, Rosenberg's counsel, in summation to the jury, had made precisely that point (i. e., that the cross parroted the direct). If the jurors had been impressed by this argument and, on that account, wanted Ruth's cross to check this very point, they would almost certainly have asked especially that the cross be read, particularly after defense counsel, in their presence, made this request. Accordingly, we hold that the refusal to have the cross read was within the trial judge's discretion.

11. As part of its case in chief, the government introduced testimony that, in 1950, after the arrest of the British atomic physicist, Dr. Klaus Fuchs, for espionage on behalf of Russia, Julius Rosenberg warned Greenglass to leave this country by way of Mexico; that Rosenberg repeated this warning after Gold's arrest; that Julius said he and his wife also intended to flee to Mexico. When the government rested, the Rosenbergs took the stand; on direct, among other things, they contradicted the foregoing testimony. On March 26, 1951, during Julius Rosenberg's cross-examination, he denied having had passport pictures taken in May or June 1950; on March 27, 1951, after the defendants had rested their case, the government called one Schneider, a professional photographer, as a rebuttal witness. Defense counsel at once objected to any testimony

by Schneider, on the ground that his name was not on the list of witnesses submitted before the trial to the defendants in accordance with 18 U.S.C. § 3432.¹¹ Thereupon, in answer to questions put by the prosecutor, Schneider testified that, on March 26, 1951, two F. B. I. agents came to see him, and that then for the first time had anyone communicated with him about the subject for which he was called as a witness. Over objection by the defense on the ground that Schneider's testimony was "not proper rebuttal," he was then allowed to testify that, in May or June 1950, at his photography shop, he had taken the photographs of the Rosenbergs and their children, and that at that time Julius Rosenberg had said the pictures were needed to enable the Rosenberg family to go abroad.¹²

[23,24] The statutory requirement concerning the list of witnesses to be supplied before trial has been held inapplicable to a rebuttal witness.¹³ Defendants argue that Schneider's testimony was inadmissible, since it served merely to corroborate evidence introduced by the government on its case-in-chief and was thus not rebuttal of new matter arising on defendants' case. A majority of this court rejects this argument.¹⁴ But, even if this argument is sound, the reception of this testimony was not erroneous. As it was a reasonable inference from Schneider's testimony that the government did not know of Schneider until the day before he was called as a witness, it could not have included his name in the witness-list handed defendants before the trial, which began some three weeks earlier. Consequently, the statute, properly interpreted, did not exclude Schneider's testimony altogether. See *United States v. Schneider*, 21 D.C. 381, 413: "The statute was never intended to preclude the United

11. It reads: "A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with * * * a list * * * of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each * * * witness."

12. No evidence was heard after March 27, 1950. Schneider was the last witness.

13. *Goldsby v. United States*, 160 U.S. 70, 76, 16 S.Ct. 216, 40 L.Ed. 343; *Gordon v. United States*, 53 App.D.C. 154, 289 F. 552, 554.

14. The writer of this opinion has some doubt as to whether it was rebuttal within the meaning of the cases relative to 18 U.S.C. § 3432. But see *State v. McCumber*, 202 Iowa 1382, 212 N.W. 137.

States from making use of any material testimony discovered during the progress of the trial, and all that it exacts of the prosecuting officer is that he shall in good faith furnish to the prisoner, before the trial, the names of all witnesses then known to him and intended to be used at the trial." It might well have been error to refuse a reasonable request for adjournment coupled with some showing of surprise. But defendants made no such request.¹⁵

12. Sobell raises several questions affecting his conviction. The most important of these is whether or not he was proved to be a member of the Rosenberg-Greenglass-Gold conspiracy to ship information to Russia. Even accepting all of Elitcher's testimony as true, says Sobell, it showed only that he, Sobell, conspired with Julius Rosenberg to solicit Elitcher's aid in espionage activities along with that of other young engineers, and to send abroad certain kinds of military engineering and fire control information,¹⁶ but no evidence connected him in any way with the Greenglass-Gold-Rosenberg plan to ship atomic information from Los Alamos to the Soviet Union. At the end of the government's case, Sobell's counsel moved to dismiss the indictment on the ground that not one but two separate conspiracies had been proved by the government,¹⁷ one involving Rosenberg, Greenglass and Gold, whose purpose was the transmission of atomic information, and the other involving Rosenberg and Sobell, aimed solely at the sending of various types of military information abroad. The motion was denied, the trial judge committing himself to the theory that the government's witnesses, if believed, proved one giant conspiracy, to send defense information abroad, of which the atomic es-

pionage was only one "branch." Despite objection by Sobell's counsel, the judge charged the jury, on the one-conspiracy theory, as follows: "Again I want to emphasize that the conspiracy in this case is a conspiracy to obtain secret information pertaining to the national defense and then to transmit it to the Union of Soviet Socialist Republics. It is not a conspiracy to obtain information only about the atom bomb. I point that out because the Government contends that Sobell was in the general conspiracy to obtain information of a secret nature. To determine whether Morton Sobell was a member of the conspiracy you are only to consider the testimony of Max Elitcher, William Danziger and the testimony relating to the defendant Sobell's alleged attempt to flee the country. If you do not believe the testimony of Max Elitcher as it pertains to Sobell, then you must acquit the defendant Sobell. If you find that there was a conspiracy and that Morton Sobell was a member of the conspiracy, any statements or acts of any co-conspirators are binding upon him because the law is that once you have joined a conspiracy attempting to accomplish an unlawful objective, the acts of the co-conspirators done in furtherance of the same objective, even though the co-conspirators are unknown to you, are binding upon you."

[25] If in fact, Sobell is right that two conspiracies were proved, then prejudicial error has been committed, for Sobell was jointly tried with major atomic energy spies whose acts and declarations were held binding upon him. What distinguishes a single conspiracy from several related ones is a single unified purpose, a "common end." This "common end" is in contradistinction to the "separate ends similar in character"

enberg in a 35-millimeter film can in 1950.

17. Sobell's counsel argued that on the basis of the indictment and information obtained from an unsuccessful attempt to get a more enlightening bill of particulars, it was impossible for Sobell to ask for a severance earlier on these grounds. Although Sobell's position seems well taken, it is not necessary to decide any question of waiver involved in his failure to request severance.

which characterize multiple conspiracies. *United States v. McConnell*, D.C.E.D.Pa., 285 F. 164, 166. Thus the Supreme Court has said that defendants who separately secure fraudulent loans through banking institutions from a single governmental agency, by means of a single broker, have separate albeit similar ends, and lack the single unified purpose of co-conspirators. *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557. On the other hand, salesmen who make illegal sales above ceiling price of a particular brand of whisky obtained from a particular wholesaler have a single unified purpose—to raise illegally the price of that whisky: "The whiskey was the same. The agreements related alike to its disposition. They comprehended illegal sales in the guise of legal ones. * * * The scheme was in fact the same scheme; the salesmen knew or must have known that others unknown to them were sharing in so large a project". *Blumenthal v. United States*, 332 U.S. 539, 557-558, 68 S.Ct. 248, 256, 92 L.Ed. 154.

[26] A majority of this court have concluded, on the following grounds, that here there was a single unified purpose: The "common end" consisted of the transmission to the Soviet Union of any and all information relating to the national defense; such a single aim distinguishes this conspiracy from that in *Kotteakos*, where each defendant was interested in obtaining his own fraudulent loan only and not in the success of his fellow-borrowers. The case is closer to the *Blumenthal* situation, where all the salesmen had a united purpose to sell the shipment of whisky at an illegally high price. Sobell is confusing the particular part each conspirator played in the espionage activities with the end-all purpose of all the conspirators—the aiding of Russia by sending to it any and all kinds of secret

information. It did not matter that Sobell knew nothing of the atomic episodes; he is nevertheless charged with the acts done by Greenglass, Gold and Rosenberg, in furtherance of the over-all conspiracy. The jury could and did reasonably find that Sobell consented to the dominant aim, and so became a member of the Rosenberg-Greenglass-Gold conspiracy.

The writer of this opinion disagrees. He thinks that there was error, in this respect, which requires that Sobell be given a new trial. The balance of this paragraph sets out the writer's reasons for dissenting on this issue. Even if Sobell, on Elitcher's testimony, could reasonably be held as a member of the Rosenberg-Gold-Greenglass conspiracy, the question of his membership should have been submitted to the jury. Elitcher's testimony would have supported either of two inferences i. e., that Sobell agreed only (1) to transmit certain kinds of military information to Russia or (2) that he agreed with the other conspirators to transmit "any military information of all kinds." The jury should have had the opportunity to choose between the inferences and to decide whether he actually joined the larger conspiracy. See *Lefco v. United States*, 3 Cir., 74 F.2d 66, 69. "Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; if later comers change that, he is not liable for the change; his liability is limited to the common purposes while he remains in it." *United States v. Peoni*, 2 Cir., 100 F.2d 401, 403, per Learned Hand, C. J. The judge's instructions (quoted above) do not, I think, make it clear to the jury that Sobell, in order to become a member of the larger conspiracy, had to agree to transmit all kinds of secret information, and not just certain kinds which he knew about.¹⁸ In effect, he charged that if

advance to the judge's theory, already enunciated in denying the motion for dismissal of the indictment, that if the Government's evidence was believed, one conspiracy and not two had been proved. In the circumstances, then, the writer thinks that the judge, on his own motion, should have submitted the question of one or several conspiracies to the jury.

15. Cf. *McNabb v. United States*, 6 Cir., 123 F.2d 848, 853, reversed on other grounds 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819; A. L. I. Code of Criminal Procedure, s. 194; *State v. Nolan*, 31 Idaho 71, 169 P. 295; *State v. Urban*, 117 Kan. 130, 230 P. 77; *Grandbouche v. People*, 104 Colo. 175, 89 P.2d 577; *State v. Harding*, 108 Wash. 606, 185 P. 579.

16. There was also evidence that Sobell delivered "valuable" information to Ros-

18. Sobell's counsel, it is true, did not submit a correct request to charge on the question of whether the jury could infer one or two conspiracies from Elitcher's testimony. He did, however, ask for dismissal of the indictment at the end of the Government's case on the ground that two conspiracies were proved, and, again before the charge, he objected in

the jury believed Elitcher's testimony, Sobell was a member of the larger conspiracy charged in the indictment.

[27] 13. Sobell alleges that the prosecutor's ill attempts at courtroom humor and "questions" containing inadmissible testimony deprived him of a fair trial. After examining each such incident, we cannot agree that, despite the judge's cautioning instructions to convict or acquit on the evidence alone, they were so important as to effect the jury adversely. Many of the so-called "loaded" questions were withdrawn before answering; objections to others were sustained and the prosecutor admonished; nothing in his summation concerning the defendants seems to have exceeded the liberal limits of legitimate partisanship and argumentation our courts customarily allow counsel. It is of some significance that Sobell's counsel himself, at the end of the trial, indicated that he thought the prosecutor had conducted himself fairly: "I am willing to shake his hand after a job that we both had to do." Similarly the Rosenbergs' counsel at the end of the trial acknowledged the good behavior of the prosecutor.

[28, 29] 14. The prosecution introduced as an entry "in the regular course of business" a card made by an Immigration Inspector at the time Sobell re-entered the United States, stating that he had been "Deported from Mexico." This evidence is attacked as both irrelevant and hearsay. But Sobell's forced return to the United States was certainly relevant to the government's theory that he had fled to Mexico to escape prosecution, for otherwise the jury might have inferred that he had returned voluntarily to stand trial. The hearsay objection is equally without merit. As an entry of this type is required in the case of every deportee from Mexico and was made by the border inspector in the course of his duties, it qualifies as a business entry

under 28 U.S.C. §§ 1732, 1733. The inspector who made the entry testified at the trial, and was available for cross-examination as to the extent of his observations and his reasons for making the entry.

15. At the end of the trial, after Sobell had been found guilty, his counsel made a motion in arrest of judgment based upon an affidavit by Sobell that he had been illegally abducted by Mexican police from his residence in Mexico City and taken across the border into the United States where he was delivered into the immediate custody of waiting United States agents. Sobell asked the trial judge to conduct a hearing on the question of whether United States officials had participated in, or instigated, his illegal kidnapping. Sobell claims that his conviction would be a nullity if it were proved that the government thus secured jurisdiction over his person in violation of United States law and international agreement.

[30-32] The government answers that, even if United States officials had participated in Sobell's alleged kidnapping, the court in a criminal case, unlike a civil case, would still have jurisdiction over his person, as long as he was physically present at the trial. There appears to be authority to support this position. *Ker v. Illinois*, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421; *Mahon v. Justice*, 127 U.S. 700, 8 S.Ct. 1204, 32 L.Ed. 283; *United States ex rel. Voigt v. Toombs*, 5 Cir., 67 F.2d 744; *United States v. Unverzagt*, D.C.W.D.Wash., 299 F. 1015, affirmed 9 Cir., 5 F.2d 492, certiorari denied 269 U.S. 566, 46 S.Ct. 24, 70 L.Ed. 415; *United States v. Insull*, D.C.N.D.Ill., 8 F.Supp. 310, 311; *Ex parte Lopez*, D.C.S.D.Tex., 6 F.Supp. 342; *Gillars v. United States*, 87 U.S.App.D.C. 16, 182 F.2d 962; *Chandler v. United States*, 1 Cir., 171 F.2d 921, certiorari denied 336 U.S. 918, 69 S.Ct. 640, 93 L.Ed. 1081. However, there are contrary arguments.¹⁹ But we need not now decide that

question. For we think that Sobell waived his right to challenge personal jurisdiction in this trial. Rule 12(b) (2) of the Federal Rules of Criminal Procedure says: "Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, * * *." Yet Sobell made no such pre-trial motion challenging jurisdiction over his person, despite the fact that all the information contained in the post-trial affidavit was known to him at that time. When the government introduced evidence to show that Sobell had been legally deported from Mexico (evidence clearly contradictory to Sobell's present assertion), he made no move to bring to light the facts of his alleged illegal abduction.²⁰ He preferred to take his chances on the verdict, withholding his trump card until the trial was over. The Federal Rules of Criminal Procedure allow no such tactic. Under Rule 34, motions in arrest of judgment are allowed only (1) where the indictment charges no offense and (2) where the court had no jurisdiction over the offense charged. This situation, we think, falls into neither category. See *United States v. Zisblatt*, 2 Cir., 172 F.2d 740, 741-742;

a defendant in a federal criminal trial, whatever the practice in state courts, could not be convicted on the basis of confessions obtained by federal agents in violation of a federal statute. Whether or not the Court would extend the McNabb policy to cover jurisdiction of the defendant's person obtained by a federal court through the illegal acts of federal officers, we do not know.

20. In his reply brief, Sobell says: "We do not contend, as the Government intimates that its violation of domestic or international law exempts Sobell from trial, but merely that he should be restored the choice * * * of entering the United States voluntarily or involuntarily. * * * What was violated was his right to be free from unlawful molestation or assault by his own Govern-

United States v. Bradford, 2 Cir., 1952, 194 F.2d 197. Personal jurisdiction can be waived in a criminal as well as a civil case. See *Pon v. United States*, 1 Cir., 168 F.2d 373, 374. *United States v. Rauscher*, 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed. 425, cited by Sobell, allowed a defendant to move in arrest of judgment on the ground that he had been tried and convicted of an offense other than the one for which he had been surrendered to the United States by Great Britain pursuant to an extradition treaty. There, however, the defendant also challenged personal jurisdiction before trial, and no question of the timeliness of his motion was involved.

[33] 16. The trial judge sentenced Julius and Ethel Rosenberg to death. The statute under which they were convicted provides that whoever violates the pertinent subsection "in time of war shall be punished by death or by imprisonment for not more than thirty years." 18 U.S.C. § 794(b). Congress had the power to prescribe the death penalty for wartime espionage. See *Cramer v. United States*, 325 U.S. 1, 45, 65 S.Ct. 918, 89 L.Ed. 1441.²¹ This, these defendants do not deny. They claim, rather, that, even if they were properly convicted, it was unconstitutional and an abuse of discretion for the trial judge to impose the extreme penalty in their particular case, and that we must reduce their sentences. In support of that contention they assert the following: They did not act from venal or

ment; and his right not to be convicted by an 'admission' wrested from him by a violent act." It seems particularly inconsistent, therefore, for Sobell not to have introduced evidence, during the trial, of his kidnapping to contradict the Government's evidence of legal deportation.

21. Since § 794(c) covers communication "in time of war" to "the enemy," it might possibly be urged that § 794(b) was not intended to apply to acts, even in war-time, which are to "the advantage of a foreign nation" when that nation is not the nation with which this country is at war but one which, at the time, is an ally. However, the legislative history contains nothing to support such an interpretation.

19. Both Supreme Court cases were decided before the federal anti-kidnapping statute passed in 1932, which would seem to forbid federal or state agents from kidnapping and transporting a defendant in foreign commerce. But see *Collins v. Frisbie*, 6 Cir., 189 F.2d 464, certiorari granted 342 U.S. 865, 72 S.

Ct. 112, reversed 342 U.S. 519, 72 S.Ct. 509. In addition, the two Supreme Court cases involved kidnapping by state agents, and the subsequent exercise of jurisdiction by state courts over the kidnapped defendants. *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819, laid down the rule that

pecuniary motives; except for this conviction, their records as citizens and parents are unblemished; at the most, out of idealistic motives, they gave secret information to Soviet Russia when it was our wartime ally; for this breach, they are sentenced to die, while those who, according to the government, were their confederates, at least equally implicated in wartime espionage—Harry Gold, Emil Fuchs, Elizabeth Bentley and the Greenglasses—get off with far lighter sentences or go free altogether.²² Finally, they argue, the death sentence is unprecedented in a case like this: No civil court has ever imposed this penalty in an espionage case, and it has been imposed by such a court in two treason cases only.²³

[34] Unless we are to over-rule sixty years of undeviating federal precedents, we must hold that an appellate court has no power to modify a sentence. "If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute." *Gurera v. United States*, 8 Cir., 40 F.2d 338, 340. See also, *e. g.*, *Beckett v.*

United States, 6 Cir., 84 F.2d 731, 733; *Scala v. United States*, 7 Cir., 54 F.2d 608, 611-612; *Peterson v. United States*, 4 Cir., 246 F. 118; *Wallace v. United States*, 7 Cir., 243 F. 300, 310; *Feinberg v. United States*, 8 Cir., 2 F.2d 955, 958; *Carpenter v. United States*, 4 Cir., 280 F. 598, 601; *Smith v. United States*, 9 Cir., 3 F.2d 1021; *Hodgskin v. United States*, 2 Cir., 279 F. 85, 94; *United States v. Cohen*, 2 Cir., 177 F.2d 523, 525; *United States v. Ward*, 2 Cir., 173 F.2d 628, 630; *United States v. Gottfried*, 2 Cir., 165 F.2d 360, 368; *Voege v. United States*, 2 Cir., 270 F. 219.²⁴ In *Blockburger v. United States*, 284 U.S. 299, 305, 52 S.Ct. 180, 182, 76 L.Ed. 306, the Supreme Court said: "Under the circumstances, so far as disclosed, it is true that the imposition of the full penalty of fine and imprisonment upon each count seems unduly severe; but, there may have been other facts and circumstances before the trial court properly influencing the extent of the punishment. In any event, the matter was one for that court, with whose judgment there is no warrant for interference on our part."²⁵ Further discussion of this

appellate power upon the newly created courts of appeal in 1891. 26 Stat. 826. Some courts therefore considered the 1879 law repealed by implication. *Freeman v. United States*, 9 Cir., 243 F. 353. But *Ballew v. United States*, 1895, 160 U.S. 187, 16 S.Ct. 263, 40 L.Ed. 388 and *Hanley v. United States*, 2 Cir., 123 F. 849, strongly suggest that the statutory powers given in the 1879 law to circuit courts had been incorporated by reference in the 1891 statute setting up the circuit courts of appeal. The fact is, however, that since 1891, federal upper courts have unswervingly denied themselves power to revise sentences on appeal.

The earliest and still most quoted federal authority rejecting the power to revise sentences on appeal is *Ex parte Watkins*, 7 Pet. 568, 574, 8 L.Ed. 786, where Story, J., said: "But this court has no appellate jurisdiction to revise the sentences of inferior courts in criminal cases; and cannot, even if the excess of the fine were apparent on the record, reverse the sentence." At that time, however, the Supreme Court actually had no federal criminal appellate jurisdiction over either judgments or sen-

subject my colleagues think unnecessary. Consequently, the subsequent paragraphs express the views only of the writer of this opinion.

That upper courts have or should have power to reduce harsh sentences has long been urged by some commentators. See, *e. g.*, Hall, *Reduction of Criminal Sentences on Appeal*, 37 Col.L.Rev. 521, 762 (1937). The existence of such power may seem the more desirable in these days when, in the recent words of the Supreme Court, "Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."²⁶ In England, Canada, and in several of our states, upper courts have held that they may revise sentences while affirming convictions. But these rulings were based on statutory authority. *Com. v. Garramone*,

sentences; Story's remark, therefore, has extremely limited value nowadays.

The Supreme Court reduced what it considered an excessive fine imposed on the United Mine Workers for contempt. *United States v. United Mine Workers*, 330 U.S. 258, 304, 67 S.Ct. 677, 91 L. Ed. 884. But there no statute authorizing particular punishment for contempt was involved; the fine was within the discretion of the trial judge, and the Supreme Court held the discretion abused. Cf. White, J., dissenting, in *Weems v. United States*, 217 U.S. 349, at pages 409-410, 30 S.Ct. 544, 54 L. Ed. 793.

26. *Williams v. New York*, 337 U.S. 241, 248, 69 S.Ct. 1079, 1084, 93 L.Ed. 1337. See also *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, as to the "substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution."

Radin writes that, in the Middle Ages, "Justice" popularly meant the gallows. Radin, A Juster Justice, in *Legal Essays in Tribute to McMurray* (1935), 537, 556. See *London Times*, Lit.Supp., January 4, 1952, p. 11: "It is not generally realized that down to the year 1826 the punishment of every felony in this country was death. * * *

27. See *Commonwealth v. Garramone*, 307 Pa. 507, 161 A. 733, 735, 89 A.L.R. 295; *State v. Ramirez*, 34 Idaho 623, 203 P. 279, 29 A.L.R. 297; *Fritz v. State*, 8

307 Pa. 307, 101 A. 733, 89 A.L.R. 295, A.L.I.Code of Cr.Proc. sec. 459.

Some of these state courts find such authority in statutes conferring power to "reverse, modify or affirm" judgments on appeal.²⁷ An identical power—to "affirm, modify * * * or reverse"—is given to federal courts of appeal and to the Supreme Court by 28 U.S.C.A. § 2106. That provision dates back to the Judiciary Act of 1789. See *United States, for Use of John Davis Co. v. Illinois Surety Co.*, 7 Cir., 226 F. 653, 664. No decision by the Supreme Court or any federal court of appeals seems to have cited or considered this statute in passing on the question of the power to reduce a sentence when a conviction is affirmed. Were this question *res nova*, this court should give that section serious consideration.²⁸ Because, however, for six decades federal decisions, including that of the Su-

Old.Cr. 342, 128 P. 170; *Pittman v. State*, 84 Ark. 292, 105 S.W. 874; see also *Commonwealth v. Sterling*, 314 Pa. 76, 170 A. 258, 259.

The courts of more than a dozen other states have not so construed identically-worded statutes. See, *e. g.*, *State v. Fowler*, 59 Mont. 346, 196 P. 992, 993, 995, 197 P. 847. See A. L. I. Code of Cr.Proc. sec. 459, Commentary.

28. The trial judge's determination of a proper sentence—no easy task—should turn on his evaluation of a host of factors, including the unique fact of the particular defendant's life, conduct and character. Where an upper court has authority to review and revise a sentence, its attempt to do so may be thwarted if the trial judge has not made public the bases of his determination (although, in some instances, a sentence may obviously be unduly harsh, no matter what the particulars of the defendant's life, etc.). In the instant case, the trial judge has publicly stated the grounds on which he based the death sentences: "Citizens of this country who betray their fellow-countrymen can be under none of the delusions about the benignity of Soviet power that they might have been prior to World War II. The nature of Russian terrorism is now self-evident. Idealism as a rationale dissolves." * * * "I consider your crime worse than murder. Plain deliberate contemplated murder is dwarfed in magnitude by comparison with the crime you have committed. In commit-

22. The information the Rosenbergs passed, they maintain, would have become known to Russia in a matter of a few years, either through disclosures of foreign research scientists who worked at Los Alamos or through research of Russian scientists.

23. *Stephan v. United States*, 6 Cir., 133 F.2d 87, certiorari denied 318 U.S. 781, 63 S.Ct. 858, 87 L.Ed. 1148; *United States v. Tomoya Kawakita*, D.C.S.D. Cal., 96 F.Supp. 824, affirmed 9 Cir., 190 F.2d 506.

24. This Court has said that where it considers a sentence unduly harsh, it will be more inclined to regard as harmful an error otherwise probably harmless. See *United States v. Hoffman*, 2 Cir., 137 F.2d 416; *United States v. Trypuc*, 2 Cir., 136 F.2d 900, 902. We have, however, found no such errors affecting the Rosenbergs.

25. At one time the circuit courts had power to correct harsh sentences on appeal. Act of 1879, 20 Stat. 354; *United States v. Wynn*, C.C.E.D.Mo., 11 F. 57; *Bates v. United States*, C.C.N.D.Ill., 10 F. 92. The peculiar wording of the 1879 statute was omitted in conferring

preme Court in *Blockburger v. United States*, supra, have denied the existence of such authority, it is clear that the Supreme

ting the act of murder, the criminal kills only his victim. The immediate family is brought to grief and when justice is meted out the chapter is closed. But in your case, I believe your conduct in putting into the hands of the Russians the A-bomb years before our best scientists predicted Russia would perfect the bomb has already caused, in my opinion, the Communist aggression in Korea, with the resultant casualties exceeding 50,000 and who knows but that millions more of innocent people may pay the price of your treason. Indeed, by your betrayal you undoubtedly have altered the course of history to the disadvantage of our country. No one can say that we do not live in a constant state of tension. We have evidence of your treachery all around us every day—for the civilian defense activities throughout the nation are aimed at preparing us for an atom bomb attack. Nor can it be said in mitigation of the offense that the power which set the conspiracy in motion and profited from it was not openly hostile to the United States at the time of the conspiracy. If this was your excuse the error of your ways in setting yourselves above our properly constituted authorities and the decision of those authorities not to share the information with Russia must now be obvious. * * * In the light of this, I can only conclude that the defendants entered into this most serious conspiracy against their country with full realization of its implications. The statute of which the defendants at the bar stand convicted is clear. I have previously stated my view that the verdict of guilty was amply justified by the evidence. In the light of the circumstances, I feel that I must pass such sentence upon the principals in this diabolical conspiracy to destroy a God-fearing nation, which will demonstrate with finality that this nation's security must remain inviolate; that traffic in military secrets, whether promoted by slavish devotion to a foreign ideology or by a desire for monetary gains must cease. The evidence indicated quite clearly that Julius Rosenberg was the prime mover in this conspiracy. However, let no mistake be made about the role which his wife, Ethel Rosenberg, played in this conspiracy. Instead of deterring him from pursuing his ignoble cause, she encouraged and assisted the cause. She was a ma-

Court alone is in a position to hold that Sec. 2106 confers authority to reduce a sentence which is not outside the bounds set by

ture woman—almost three years old than her husband and almost seven years older than her younger brother. She was a full-fledged partner in this crime. Indeed the defendants Julius and Ethel Rosenberg placed their devotion to their cause above their own personal safety and were conscious that they were sacrificing their own children, should their misdeeds be detected—all of which did not deter them from pursuing their course. Love for their cause dominated their lives—it was even greater than their love for their children."

A few minutes before, during defense counsel's remarks prior to sentencing, the judge said: "You overlooked one very salient feature, and that is that their activities didn't cease in 1945, but that there was evidence in the case of continued activity in espionage right on down, even during a period dealing with a hostile nation."

On sentencing Greenglass to fifteen years' imprisonment, the judge said: "The fact that I am about to show you some consideration does not mean that I condone your acts or that I minimize them in any respect. They were loathsome; they were contemptible. I must, however, recognize the help given by you in apprehending and bringing to justice the arch criminals in this nefarious scheme, Julius Rosenberg and his wife, Ethel Rosenberg. You have at least not added to your sins by committing the additional crime of perjury. You confessed and told a complete story in this case and it has been of great assistance to the Government. I realize the courage that was required for you to give your testimony, and I must say that you were the recipient of the best kind of legal advice in doing so. It is obvious that the Government gave due consideration to your assistance in their recommendation. I have to be realistic in a situation such as this, and I recognize that despite my own inclination to be more severe on your sentence, due to the revolting nature of this offense, I must subordinate my own feeling. Our national security is more important than any personal feeling that I might have on the subject, and it is indeed more important, I think, than the punishment of any single individual; and by your assistance in this case you have helped us strike a death blow to the trafficking in our military secrets, to the advantage of a foreign nation."

a valid statute.²⁹ As matters now stand, this court properly regards itself as powerless to exercise its own judgment concerning the alleged severity of the defendants' sentences.³⁰

The Rosenbergs, however, advance a different argument, *i. e.*, that, although the statute expressly and validly permits death sentences, we do have the power and the duty to order these particular death sentences reduced because they violate the Eighth Amendment of the Constitution, which forbids any "cruel and unusual punishments". Several courts have ruled that a sentence within the limits of a valid stat-

29. The reluctance of upper courts to interfere with the sentencing process may perhaps, at least in part, be due to the existence of the executive's pardoning power, and in part to a desire not to engage in a most difficult undertaking. That process calls for training and specialized knowledge of a kind which the education of few judges provides. See Page, *The Sentence of the Court* (1948), which treats of the English judiciary, but seems substantially applicable to ours. Page points out that among English judges it "could scarcely be claimed that * * * there is any agreed and commonly accepted principle guiding their selection of punishment," and quotes Mr. Justice McCardle who said: "Anyone can try a case. That is as easy as falling off a log. The difficulty comes in knowing what to do with a man once he has been found guilty." However, as noted above, it is arguable that the difficulty makes it the more desirable that upper courts be able to review and modify sentences.

30. Where an upper court has such power, the criterion used to determine whether a sentence is too harsh would seem to be that court's own judgment—not the "common conscience."

It has been held that, in such circumstances, the upper court may consider, for such purposes, the quality of the evidence on which the verdict rests. See *Fritz v. State*, 8 Okl.Cr. 342, 128 P. 170. So here, had this court such power, it might take into consideration the fact that the evidence of the Rosenbergs' activities after Germany's defeat (as well as of their earlier espionage activities) came almost entirely from accomplices.

31. See, however, *Schultz v. Zerbst*, 10 Cir., 73 F.2d 668, 670; *Moore v. Aderhold*, 10 Cir., 108 F.2d 729, 732; *Dryden*

ute cannot amount to "cruel and unusual punishments", that, when a statute provides for such punishment, the statute only can be thus attacked. *Johnson v. United States*, 8 Cir., 126 F.2d 242, 251; *Beckett v. United States*, 6 Cir., 84 F.2d 731; *Hemans v. United States*, 6 Cir., 163 F.2d 228, 237-238, certiorari denied 332 U.S. 801, 68 S.Ct. 100, 92 L.Ed. 380; cf. *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793. No federal decision seems to have held cruel and unusual any sentence imposed under a statute which itself was constitutional.³¹ But let it be assumed that, even if the statute authorizing a sentence does not

v. United States, 8 Cir., 139 F.2d 487, 488; *United States v. Sorcey*, 7 Cir., 151 F.2d 899, 902-903. These cases say that a sentence authorized by statute usually will not be cruel and unusual punishment, but are not altogether clear as to whether a sentence may be such, even if the statute is not. In this respect, see Mr. Justice Field, dissenting, in *O'Neil v. Vermont*, 144 U.S. 323, 340, 12 S.Ct. 693, 700, 36 L.Ed. 450: "It is no matter that by cumulative offenses, for each of which imprisonment may be lawfully imposed for a short time, the period prescribed by the sentence was reached, the punishment was greatly beyond anything required by any humane law for the offenses."

Cf. *In re Kemmler*, 136 U.S. 436, 446, 10 S.Ct. 930, 933, 34 L.Ed. 519, quoted in *State of Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, footnote 4, 67 S.Ct. 374, 376, 91 L.Ed. 422: "* * * but the language in question, as used in the constitution of the State of New York was intended particularly to operate upon the legislature of the state, to whose control the punishment of crime was almost wholly confided." Cf. *Story, Commentaries on the Constitution*, §. 1903: "* * * the provision would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct. * * *" The inhibition is "directed * * * against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged." Field, J., in *O'Neil v. Vermont*, supra, 144 U.S. 339-340, 12 S.Ct. 699.

In *State of Louisiana ex rel. Francis v. Resweber*, supra, the Court considered whether an electrocution, after a first attempt to electrocute had failed for

icular sentence, within the literal terms of that statute, may do so, because of the specific circumstances of the case.³² No such circumstances exist in this case. The test of a "cruel and unusual punishment" urged by the defendants—i. e., that "it shocks the conscience and sense of justice of the people of the United States"³³—is not met here.

The test (unlike that applied when an upper court has discretion to modify sentences)³⁴ invites the criticism that it shifts the moral responsibility for a sentence from the consciences of the judges to the "common conscience."³⁵ But that criticism aside, this test counts against the defendants, for it means that this court, before it reduces a sentence as "cruel and unusual," must have reasonably good assurances that the sentence offends the "common conscience." And, in any context, such a standard—the community's attitude—is usually an unknowable.³⁶ It resembles a slithery shadow, since one can seldom learn, at all accurately,

mechanical reasons, would be so cruel and unusual as to violate the due process clause, even if authorized by the Louisiana statute. In *Johnson v. Dye*, 3 Cir., 175 F.2d 250, 256, reversed on other grounds, 338 U.S. 864, 70 S.Ct. 146, 94 L.Ed. 530, the court called the treatment of Georgia chain-gang prisoners "cruel and unusual punishment" and so a violation of the due process clause of the Fourteenth Amendment. Perhaps it can be said that that treatment was so common in Georgia as to have become part of the penalties prescribed by the statute. See also *Kenimer v. State ex rel. Webb*, 81 Ga.App. 437, 59 S.E.2d 296.

32. *United States ex rel. Bongiorno v. Ragen*, D.C.N.D.Ill. 54 F.Supp. 973, affirmed 7 Cir., 146 F.2d 319. Perhaps this is but an elliptical way of saying that, if the statute permitted such a sentence, the statute would be unconstitutional, and therefore the statute should be so interpreted as to preclude that sort of sentence.

33. *Id.*

The test may have been derived from the language of some Supreme Court decisions: "Taking human life by unnecessarily cruel means shocks the most fundamental instincts of civilized man"; *State of Louisiana ex rel. Francis v. Res-*

sy Leche," 357 U.S. 361, according to a majority opinion poll" would be inconclusive in a case like this.³⁸ Cases are conceivable where there would be little doubt of a general public antipathy to a death sentence. But (for reasons noted below) this is not such a case.

In all likelihood, it would be—if the evidence were as the Rosenbergs depict it: They say that they were sentenced to death, not for espionage, but for political unorthodoxy and adherence to the Communist Party, and that (assuming they are guilty) they had only the best of motives in giving information to Russia which, at the time, was an ally of this country, praised as such by leading patriotic Americans. But the trial judge, in sentencing the Rosenbergs, relied on record evidence which (if believed) shows a very different picture. If this evidence be accepted, the conspiracy did not end in 1945, while Russia was still a "friend," but, as the trial judge phrased it, continued "during a period when it was ap-

weber, supra, 329 U.S. at page 473, 67 S.Ct. at page 281, Burton dissenting: " * * * a punishment at the severity of which, considering the offenses, it is hard to believe that any man of right feeling and heart can refrain from shuddering"; *O'Neil v. Vermont*, 144 U.S. 333, 340, 12 S.Ct. 693, 700, 36 L.Ed. 450. " * * * the judgment of mankind would be that the punishment was not only an unusual, but a cruel, one, and a cry of horror would rise from every civilized and Christian community of the country against it." *Id.*

34. See note 30, supra.

35. See Cahn, *Authority and Responsibility*, 51 Col.L.Rev. (1951) 838. Cahn's thesis suggests that a trial judge, in fixing a sentence, ought—after examining external data, including especially professional judgments in like cases—to rely on his own internal valuation and should not use the "common conscience" as a "scape-goat." See also Gray, *The Nature and Sources of Law* (2d Ed. 1921), 287ff.

36. *Cf. Schmidt v. United States*, 2 Cir., 177 F.2d 450, 451–452.

37. *Cf. Johnson v. United States*, 2 Cir., 186 F.2d 588, 590.

38. *Cf. Roth v. Goldman*, 2 Cir., 172 F.2d 788, 796, concurring opinion.

with a bare naked nation. For, according to government witnesses, in 1948 Julius Rosenberg was urging Elitcher to stay with the Navy Department so that he might obtain secret data; in 1948, Rosenberg received "valuable" information from Sobell; in 1950, Rosenberg gave Greenglass money to flee to Russia. This court cannot rule that the trial judge should have disbelieved those witnesses whom he saw and heard testify.³⁹ And, although the indictment did not charge, and therefore the jury did not find, that the Rosenbergs intended to harm the United States, the trial judge could properly consider the injury to this country of their conduct, in exercising his discretion as to the extent of sentences within the statutory limits. *Cf. Williams v. New York*, 337 U.S. 241, 251–252, 69 S.Ct. 1079, 1085, 93 L.Ed. 1337: "It is urged, however, that we should draw a constitutional distinction as to the procedure for obtaining information where the death sentence is imposed. We cannot accept the contention. Leaving a sentencing judge free to avail himself of out-of-court information in making such a fateful choice of sentences does secure to him a broad discretionary power, one susceptible of abuse. But in considering whether a rigid constitutional barrier should be created, it must be remembered that there is possibility of abuse wherever a judge must choose between life imprisonment and death. And it is conceded that no federal constitutional objection would have been possible if the judge here had sentenced appellant to death because appellant's trial

39. The situation is not like that which exists when an upper court has authority to modify a sentence which is within the limits of a valid statute. See note 24, supra.

40. *Cf. Howard v. Fleming*, 191 U.S. 126, 135–136, 24 S.Ct. 49, 48 L.Ed. 121; *Collins v. Johnston*, 237 U.S. 502, 510, 35 S.Ct. 649, 59 L.Ed. 1071.

41. A sentence, although not "cruel and unusual," may violate the due process clause. *Townsend v. Burke*, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690. There the Court held invalid a sentence imposed because of the trial judge's mistaken belief that the defendant was guilty of other crimes, and in a case where defendant

had sentenced him to death giving no reason at all. We cannot say that the due-process clause renders a sentence void merely because a judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence."

We must, then, consider the case as one in which death sentences have been imposed on Americans who conspired to pass important secret information to Russia, not only during 1944–1945, but also during the "cold war." Assuming the applicability of the community-attitude test proposed by these defendants, it is impossible to say that the community is shocked and outraged by such sentences resting on such facts. In applying that test, it is necessary to treat as immaterial the sentences given (or not given) to the other conspirators, and also to disregard what sentences this court would have imposed or what other trial judges have done in other espionage or in treason cases.⁴⁰ For such matters do not adequately reflect the prevailing mood of the public. In short, it cannot be held that these sentences are unconstitutional.⁴¹

Affirmed.

Petition for Rehearing in No. 22201.

[35] In their petition for rehearing, the defendants, for the first time, urge as pertinent that portion of Article III, Section 3 of the Constitution, which provides: "Treason against the United States, shall consist only in levying War against them, or in ad-

was not represented by counsel. There is nothing equivalent here.

The Rosenbergs, of course, may ask the Supreme Court, considering 28 U.S.C. § 2106, to over-rule the decisions precluding federal appellate modification of a sentence not exceeding the maximum fixed by a valid statute, and to direct us accordingly to consider whether or not these sentences are excessive; or the Rosenbergs, pursuant to Federal Rule of Criminal Procedure 35, may move the trial judge for a reduction of their sentences; or, if those alternatives fail, these defendants may seek relief from the President. See *Biddle v. Perovich*, 274 U.S. 480, 47 S.Ct. 664, 71 L.Ed. 1161.

and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." The Rosenbergs, as we understand them, rest two arguments on this provision.

(1) The first runs thus: (a) Had the defendants been indicted and tried for giving aid to an "enemy," the crime charged would have been treason, and they could not have been convicted unless the trial judge instructed the jury as to the two-witness rule and told the jury specifically the overt act or acts which a jury must find in order to justify a verdict of guilty.¹ (b) Here the defendants were indicted and tried for giving aid to a country which was not an "enemy." (c) Consequently, the crime of which they were accused was of the same kind as treason—but of a lesser degree. (d) The constitutional safeguards applicable to a trial of the greater crime of this kind must be applied to the lesser. (e) But here there were no such safeguards, since the trial judge did not give the instructions constitutionally required in a treason trial.

The Supreme Court's decision in *Ex parte Quirin*, 317 U.S. 1, 38, 63 S.Ct. 2, 16, 87 L. Ed. 3, disposes of this contention. There the defendants, including Haupt and Burger, United States citizens, were held guilty of violating the article of War which make it a crime, punishable by death, for an enemy belligerent to pass our boundaries without uniform or other insignia signifying

1593. Admittedly, the conduct constituting this crime would also, in the case of Haupt and Burger, have constituted treason, but this crime of which the defendants were accused was more specific than treason. The Supreme Court (of its own motion) raised, and then rejected, the argument that, on this account, the procedural requirements of a treason trial must be, and had not been satisfied. The Court said: "The argument leaves out of account the nature of the offense which the Government charges and which the Act of Congress, by incorporating the law of war, punishes. It is that each petitioner, in circumstances which gave him the status of an enemy belligerent, passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose. The offense was complete when with that purpose they entered—or, having so entered, they remained upon—our territory in time of war without uniform or other appropriate means of identification. For that reason, even when committed by a citizen, the offense is distinct from the crime of treason defined in Article III, § 3 of the Constitution, since the absence of uniform essential to one is irrelevant to the other. Cf. *Morgan v. Devine*, 237 U.S. 632, 35 S.Ct. 712, 59 L.Ed. 1153; *Albrecht v. United States*, 273 U.S. 1, 11, 12, 47 S.Ct. 250, 253, 254, 71 L.Ed. 505." This ruling has been criticized. See e. g., Hurst, *Treason in the United States*, 58 *Harvard Law Rev.* (1945) 395, 421.² But

After quoting that passage from that opinion which we have quoted above in the text, Hurst continued: "The decisions cited as analogies by the Court are the now standard authorities holding that the double jeopardy clause of the Constitution is not violated by conviction for two or more offenses which are in substance part of the same criminal transaction, but which involve different elements in the allegation. It is not a convincing technique of interpretation to apply to a constitutional guaranty having its own history of policy a formal test developed under a different clause of the Constitution, with no demonstration that the policies behind the respective clauses are so similar as to be fulfilled by the same criterion. The double jeopardy clause is

this ruling. (c) Accordingly, the trial judge should be directed to reduce the sentence.⁴

In the *Quirin* case, the absence of uniform was an additional element, essential to Haupt's non-treason offense although irrelevant to his treason; in the Rosenbergs' case, an essential element of treason, giving aid to an "enemy," is irrelevant to the espionage offense.

[36] (2) The Rosenbergs present a second argument, which is a variant of the first and is as follows: (a) Traditionally, and in this country by statute, the courts have been authorized to impose the death penalty for treason. (b) To authorize such a sentence for a similar but less grave offense, in the trial of which there are omitted the guaranteed safeguards of a treason trial, is to permit "cruel and unusual" punishment in violation of the Constitution. (c) That part of the Espionage Act which authorizes the death sentence is therefore unconstitu-

historically a guaranty against abuse of the law enforcement machinery as such, without reference to abuses peculiar to any one of the major types of crime. When the Constitution singles out the offense of treason as subject to special abuse, citation of a highly technical rule developed by judicial construction out of the general guaranty is in itself little evidence that the peculiar dangers against which the special guaranty was erected have been avoided. Though the type of offense charged against the American citizen in the saboteur group is a very clear case of treason, it is also within the category of charge the abuse of which was feared by the framers. The 'absence of uniform' noted as the essentially distinct element of the offense under the law of war made the defendant's conduct more dangerous simply because it enabled him to appear as what he was—one of the body of citizens. And it was citizens that the limitations of the treason clause were intended to protect."

3. The defendants suggest that the *Quirin* decision, because it involved an appeal from a military tribunal of a conviction for an offense against the laws of war, "was based alone on a resolution of the conflict of the jurisdiction of military and civil authority." We do not read the

This argument, we think, involves an unfounded assumption, i. e., that Congress will always authorize the death sentence for treason. Without that assumption the argument would compel the strange conclusion that, if Congress, in its discretion, authorized a maximum twenty-year penalty for treason, no greater punishment could be given for espionage, sedition or a similar crime without its becoming "cruel and unusual." Moreover, as the *Quirin* case had the unavoidable consequence of permitting death sentences to be imposed upon the citizen-saboteurs for crimes other than treason, the Supreme Court must there have implicitly rejected the "cruel and unusual" argument. As, however, the Supreme Court did not specifically discuss it, that Court may well think it desirable to review that aspect of our decision in this case.

Petition for rehearing denied.

opinion that way. See Hurst, *supra*, at 422, note 135.

4. See Hurst, *supra*, at 423: "There is the possibility that Congress might be restrained by the constitutional ban on cruel or unusual punishments from imposing the highest penalties for certain conduct, unless it were held to mount to the level of treason." In a footnote, Hurst adds: "A penalty may be 'cruel and unusual' because unreasonably disproportionate to the offense. *Weems v. United States*, 1910, 217 U.S. 349 [30 S.Ct. 544, 54 L.Ed. 793]; see *Chambers v. Florida*, 1940, 309 U.S. 227, 236 [60 S.Ct. 472, 84 L.Ed. 716]. The contention that severe penalties possible under sedition acts are so disproportionate as to violate the Eighth Amendment has not met with success, and it seems that no legislative excess short of including capital punishment would run afoul of this provision. Cf. *Dunne v. United States*, 8 Cir. 1943, 138 F.2d 137, 140, cert[iorari] denied [320 U.S. 790 [64 S.Ct. 205, 88 L.Ed. 476]; *Chafee*, *Free Speech in the United States* (1941) 480. But cf. *Hendon v. Lowry*, 1937, 301 U.S. 242 [57 S.Ct. 732, 81 L.Ed. 1066]; *Chafee*, *op. cit.* 396. See 1 Schofield, *Essays on Constitutional Law and Equity* (1921) 421."

1. Cf. our analogous holding in *United States v. Remington*, 2 Cir., 191 F.2d 246, with reference to the similar two-witness (or one corroborated witness) rule applicable to proof of an overt act in a perjury trial.

2. Hurst commented: "On the other hand, where the defendant is charged with conduct involving all the elements of treason within the constitutional definition, and the gravamen of the accusation against him is an effort to subvert the government, or aid its enemies, it would seem in disregard of the policy of the Constitution to permit him to be tried under another charge than 'treason.' However, the decision in *Ex parte Quirin* casts considerable doubt on the validity of this analysis."

UNITED STATES v. ROSENBERG et al.

Nos. 162, 163, Dockets 22570-22571.

United States Court of Appeals
Second Circuit.

Argued Dec. 22, 1952.

Decided Dec. 31, 1952.

Petition by prisoners for release from custody upon ground that sentences of guilty of conspiracy to violate Espionage Act were imposed in violation of Constitution or laws of the United States. The United States District Court for the Southern District of New York, Sylvester J. Ryan, J., 108 F.Supp. 798, dismissed the petitions, and prisoners appealed. The Court of Appeals, Swan, Chief Judge, held that treating as true all facts stated in the petitions and accompanying affidavits and exhibits, and disregarding all contrary statements of fact in the government's affidavits, petitioners were not entitled to relief.

Orders affirmed.

1. Criminal Law ⇨997

Under statute providing for release from custody of petitioners whose sentences were imposed in violation of Constitution or laws of the United States, court must grant a prompt hearing, determine the issues and make findings of fact and conclusions of law with respect thereto, unless motion and files and records of case conclusively show that prisoner is entitled to no relief. 28 U.S.C.A. § 2255.

2. Criminal Law ⇨997

The remedy offered by statute providing for release from custody of prisoners whose sentences were imposed in violation of Constitution or laws of the United States cannot ordinarily be used in lieu of appeal to correct errors committed in course of trial, even though such errors relate to constitutional rights, nor can it be used to obtain retrial according to procedure which petitioner voluntarily discarded and waived at trial. 28 U.S.C.A. § 2255.

3. Criminal Law ⇨997

Where judge before whom petitioners moved for release from custody on ground that their sentences were imposed in violation of Constitution or laws of the United

States held no hearing at which testimony could be presented, he was not obliged to accept as facts conclusionary allegations asserted by the petitioners, but all facts stated in petitions and in accompanying affidavits and exhibits would be treated as true, and all contrary statements of fact in government's affidavits would be disregarded. 28 U.S.C.A. § 2255.

4. Criminal Law ⇨997

Defendants who did not move for change of venue or continuance, and did not exhaust peremptory challenges against jurors who had been carefully questioned as to whether they had read or heard about case, and did not allege that any trial juror was in fact prejudiced by publicity surrounding trial, were not entitled to be released from custody on ground that newspaper publicity before and during trial deprived them of their constitutional right to trial by an impartial jury. 18 U.S.C.A. § 794; 28 U.S.C.A. § 2255.

5. Criminal Law ⇨997

On motion for release from custody upon ground that newspaper publicity before and during trial deprived them of their constitutional right to trial by an impartial jury, judge did not abuse his discretion in declining to grant a hearing to receive opinion testimony of a supposed expert on mass psychology. 28 U.S.C.A. § 2255.

6. Criminal Law ⇨997

Assuming that prosecutor of defendants accused of conspiracy to violate Espionage Act had deliberately timed the publication of a perjury indictment and the release of a press statement which intimated that Government had expected to use accused's testimony to corroborate other prosecution witnesses, and that he had been indicted because he backed out, defendants who did not move for mistrial or request trial judge to caution jury to disregard the publicity and who did not allege or present evidence that any juror read the newspaper story, were not entitled to be released from custody on ground that such prejudicial publicity had deprived them of their constitutional right to trial by an impartial jury. 28 U.S.C.A. § 2255.

7. Criminal Law ⇨867

When publicity believed to be prejudicial occurs during a trial, the defendant may move for a mistrial or may request the trial judge to caution the jury to disregard it.

8. Criminal Law ⇨706

In prosecution for conspiracy to violate Espionage Act, where prosecution witness who allegedly had been co-conspirator testified that he did not withhold any facts from F.B.I. on night of his arrest, statement made by prosecutor to the effect that witness' innocence had been protested at arraignment but that he had subsequently made disclosure of facts, when read in context, was not basis for inferring that perjurious testimony had been knowingly used, with result of imposing sentence upon petitioners in violation of Constitution or laws of the United States. 18 U.S.C.A. § 794; 28 U.S.C.A. § 2255.

9. Criminal Law ⇨997

On motion by defendants, who had been convicted of conspiracy to violate Espionage Act, for release from custody on ground that prosecution witness had perjured himself by testifying that he made drawing of atom-bomb compounds from memory, scientists who did not know witness could not give opinion about quality of his memory, and their affidavits which bore solely on the issue of the credibility of witness' testimony, were insufficient on their face to sustain the motion. 18 U.S.C.A. § 794; 28 U.S.C.A. § 2255.

10. Criminal Law ⇨997

Where prosecution witness at whose shop defendants had done business and who was brought to court to identify defendants, testified next day that he had not seen defendants between day they were in shop and day of testimony, such testimony, which was not intentionally false and which was treated by court and counsel as meaning that witness had not seen defendants before trial and which was on an immaterial point, was not basis for releasing defendants from custody on ground that testimony was perjured. 18 U.S.C.A. § 794; 28 U.S.C.A. § 2255.

¹ The Act as it now reads is 18 U.S.C.A. § 794.

11. Criminal Law ⇨997

On motion for release from custody on ground that sentence of guilty of conspiracy to violate Espionage Act was imposed in violation of the Constitution or laws of the United States, contention that evidence of treachery and general intent to betray did not suffice to prove specific intent required by Espionage Act raised a question of law as to which there was no need for the taking of evidence. 18 U.S.C.A. § 794; 28 U.S.C.A. § 2255.

12. War and National Defense ⇨48

Evidence of treachery and general intent to betray sustained conviction for conspiracy to violate Espionage Act. 18 U.S.C.A. § 794.

13. Criminal Law ⇨1166½(4)

Where defendant's motion for release from custody on ground that sentence was imposed in violation of Constitution or laws of the United States did not raise issues which required his presence as a witness, his absence, which resulted from a refusal to direct his return while motion was under consideration, was not harmful. 28 U.S.C.A. § 2255.

Emanuel Bloch, New York City, for appellants Julius Rosenberg and Ethel Rosenberg.

Howard N. Meyer, Harold M. Phillips and Edward Kuntz, New York City, for appellant Morton Sobell.

Myles J. Lane, U. S. Atty., New York City, James B. Kilsheimer, III, New York City, of counsel, for appellee.

Before SWAN, Chief Judge, and CHASE and FRANK, Circuit Judges.

SWAN, Chief Judge.

[1] The appellants were convicted of conspiracy to violate the Espionage Act.¹ They were sentenced on April 5, 1951. Their conviction was affirmed by this court,² and thereafter petitions for certiorari and for rehearing were denied by the Supreme Court. The present appeals are

² United States v. Rosenberg, 2 Cir., 195 F.2d 583.

U.S.C.A. § 2255 by which the petitioners sought release from custody upon the ground that their sentences were imposed in violation of the Constitution or laws of the United States. Under this section the court must grant a prompt hearing, determine the issues and make findings of fact and conclusions of law with respect thereto, "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief". After hearing oral argument of counsel for petitioners and of the United States Attorney, Judge Ryan ruled that it was conclusively shown that the petitioners were entitled to no relief and that no material issue of fact was raised which required a "hearing." He wrote an able, careful and comprehensive opinion, familiarity with which will be assumed without repeating herein his discussion of the points considered.

[2] The remedy afforded by this statutory proceeding is analogous to that afforded by a writ of habeas corpus. *United States v. Hayman*, 342 U.S. 205, 72 S.Ct. 263. It, like that writ, "cannot ordinarily be used in lieu of appeal to correct errors committed in the course of a trial, even though such errors relate to constitutional rights." *United States v. Walker*, 2 Cir., 197 F.2d 287, 288; *Adams v. United States ex rel. McCann*, 317 U.S. 269, 274, 63 S.Ct. 236, 87 L.Ed. 268. Nor can it be used to obtain a retrial according to procedure which the petitioner voluntarily discarded and waived at the trial upon which he was convicted. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 281, 63 S.Ct. 236, 87 L.Ed. 268; *Carruthers v. Reed*, 8 Cir., 102 F.2d 933, 938; *United States ex rel. Marshall v. Snyder*, 2 Cir., 160 F.2d 351, 353; *Bowen v. United States*, 5 Cir., 192 F.2d 515, 517; *Smith v. United States*, 88 U.S.App.D.C. 80, 187 F.2d 192, 198, certiorari denied 341 U.S. 927, 71 S.Ct. 792, 95 L.Ed. 1358. These limitations on the function of a petition under § 2255 must be borne in mind in considering the present appeals.

[3] Since Judge Ryan held no hearing at which testimony could be presented, it is

in the petitions and in accompanying affidavits and exhibits, and to disregard all contrary statements of fact in the government's affidavits. This does not mean, however, that Judge Ryan was obliged to accept as facts conclusionary allegations asserted by the petitioners. See *United States v. Sturm*, 7 Cir., 180 F.2d 413, 414; *United States v. Pisciotta*, 2 Cir., 199 F.2d 603. For example, the fact that newspapers carried the stories set out in the exhibits must be accepted, but the conclusion that such publicity made impossible the selection of an impartial jury is an inference which the judge is not necessarily bound to accept. If, so treating the allegations of fact, the petitioners would be entitled to relief on any particular item, we should remand as to that item for the taking of testimony and the making of findings of fact. With this preliminary statement as to the necessary approach to the problem we turn to the particular items upon which the petitioners relied as entitling them to relief.

[4,5] 1. Alleged prejudicial newspaper publicity. The first ground of attack upon their conviction asserted by the petitioners is that newspaper publicity before and during their trial, some of which was government inspired, was such as to bring about "a communal prejudgment of their guilt" and thus deprive them of their Constitutional right to trial by an impartial jury. A great mass of newspaper clippings was submitted as exhibits attached to their petitions. They cover a period from February 1, 1950 to April 3, 1951. Nothing with specific reference to the petitioners appeared until about the time of their arrest. Julius Rosenberg was arrested July 17, Ethel Rosenberg August 11, and Morton Sobell August 18, 1950. The trial commenced March 6, 1951 and ended March 29th. There was considerable newspaper comment when they were arrested. During September, October and November, newspaper references to the case were few and brief. From November to February 21, 1951, there were no news items whatever concerning the pending prosecution. When a defendant believes that pretrial

side the selection of an impartial jury, there are well-recognized methods of raising this issue before the trial commences. He may move for a change of venue or for a continuance until the public clamor shall have subsided. The petitioners took neither of these courses. On the *voir dire* the prospective jurors were carefully questioned as to whether they had read or heard about the case and a jury was selected satisfactory to the defendants, who did not even use all the peremptory challenges permitted them. Nor do they allege that any trial juror was in fact prejudiced by the publicity now asserted to have made a fair trial impossible.³ Their present position is obviously an after-thought, inspired by the hope of securing a new trial after having exhausted all hope of reversing the verdict by appeal and petitions for certiorari. The excuse offered by counsel for the Rosenbergs is that he did not realize at the date of the trial the extent and the inflammatory character of the publicity as it could not have been revealed to him "by the usual sporadic reading of an average newspaper reader," and he was so busy that he "read the newspapers" infrequently. But if he did not realize it, there is no reason to suppose that the jury was more seriously affected. Sobell's argument also urges that he and his counsel could not until the government rested its case have been aware of how detrimental the publicity regarding "atom spies" was. In essence this argument appears to be that the evidence at the trial showed that there were two conspiracies in only one of which was Sobell involved, a contention which was ruled against him on the prior appeal. Moreover, Sobell's petition alleges that the publicity concerning Julius Rosenberg "obviously rebounded to the prejudice of all defendants." If so, this should have been as obvious to him at the time of trial as now. The only evidence the petitioners wished to offer as to the effect of the newspaper

publicity, if a hearing were accorded, was the opinion testimony of a supposed expert on mass psychology. Judge Ryan did not abuse his discretion in declining to grant a hearing to receive such opinion evidence. The situation in *Delaney v. United States*, 1 Cir., 199 F.2d 102, upon which the petitioners so strongly rely, was very different. Not only was the *Delaney* publicity more obviously damaging and much closer to the date of trial but there the defendant did move for a continuance and the denial of this motion was the ground on which the court reversed the appellant's conviction. The best that can be said in the instant case is that, at the time of trial, astute counsel decided that the publicity did their clients no harm, and now want this court to decide otherwise.⁴

[6,7] With respect to newspaper publicity during the trial, the petitioners' principal complaint relates to stories concerning the indictment of one Perl. He was indicted for perjury committed in denying that he knew Sobell, Julius Rosenberg and certain persons whose names were prominently mentioned in the trial of the petitioners. The indictment, when returned, was ordered sealed. It was made public on March 15, 1951. The affidavits show that Mrs. Greenglass was still on the witness stand when the story of the Perl indictment was published in the city papers, and that the New York Times carried a statement ascribed to the United States Attorney then in office, as follows:

"Mr. Saypol said also that Perl had been listed as a witness in the current espionage trial. His special role on the stand, Mr. Saypol added, was to corroborate certain statements made by David Greenglass and the latter's wife, who are key Government witnesses at the trial."

The petitioners assert that the unsealing of the Perl indictment and the statement by Mr. Saypol were timed by the prosecution

zant of this newspaper publicity. For the assertion to the contrary is not made by trial counsel for Mrs. Rosenberg nor by one of the two trial counsel for Sobell.

3. Whether in appropriate circumstances such a showing may be dispensed with, we need not now decide.
4. Of the four trial counsel, two at least must be deemed to have been fully cogni-

with the purpose of prejudicing them in their trial. Since no hearing was accorded, we must, as already stated, assume that publication of the indictment was deliberately "timed" and the statement attributed to Mr. Saypol was made by him. Such assumed tactics cannot be too severely condemned. But the essence of the wrong done the petitioners does not lie in the intent of the prosecutor but in the prejudicial publicity which may come to the attention of the jury. When publicity believed to be prejudicial occurs during a trial, the defendant may move for a mistrial or may request the trial judge to caution the jury to disregard it. *United States v. Weber*, 2 Cir., 197 F.2d 237, 239. In this case the defendants did neither. We may assume that, in this case, a cautionary instruction would not suffice, and that, if defendants had then moved for a mistrial, it should have been granted. But they did not so move. This was their deliberate choice after conferring with the judge out of the presence of the jury. They now seek to excuse the omission because when they conferred with the judge Mr. Saypol gave assurance that he had not "timed" the Perl indictment. Such assurance they then accepted as true but they have recently concluded that it was false, because Perl has not yet been brought to trial. This is not a valid excuse. As stated above, Mr. Saypol's motive and "timing" in opening the indictment are irrelevant; the wrong consisted in the statement made to the press to the effect that the government had expected to use Perl's testimony to corroborate the Greenglasses, and the intimation that because he had backed out he had been indicted for perjury. Such a statement to the press in the course of a trial we regard as wholly reprehensible. Nevertheless we are not prepared to hold that it vitiates the jury's verdict when there is no allegation or evidence that any juror read the newspaper story and the defendants deliberately elected not to ask for a mistrial. Cf. *Spreckels v. Brown*, 212 U.S. 208, 213-215, 29 S.Ct. 256, 53 L.Ed. 476. As they thus chose to have the trial continue, they obviously concluded that the prosecutor's statement to the press had not prejudiced the jury against them.

Having themselves so concluded, they may not, after an adverse verdict, ask the court to reach a contrary conclusion. Indeed the petitioners did not mention the prosecutor's statement in their motions for a new trial nor on their previous appeal.

[8] 2. Alleged use of perjurious testimony. The second ground of attack on their conviction is that the prosecution knowingly used false testimony. There are three specifications. The first relates to Greenglass' testimony that on the night of his arrest he did not withhold any facts from the FBI. When he was sentenced on April 6, 1951, the day after the petitioners' sentences, the United States Attorney stated to the court, "Mr. Rogge protested his innocence" at the arraignment. "Through Ruth Greenglass, his wife, came the subsequent recantation of these protestations, their repudiation and the disclosure of the facts by both of them." On the basis of this statement the petitioners argue that the testimony was false and known to be false by the prosecuting officer. Judge Ryan said that when read in context with all the proceedings on April 6th he did not regard it as an admission that Greenglass had committed perjury and that there was no factual basis for inferring that perjurious testimony had been knowingly used. We agree. It is notable that petitioners made no mention of these facts on their previous appeal although then well aware of them.

[9] The second specification relates to Greenglass' testimony that, the day before he began to testify, he made from memory certain drawings of lens molds used several years before at Los Alamos in the atom-bomb project. The petitioners contend that it would have been impossible for him to make these sketches from memory and hence his testimony that he did so was false and the prosecution must have known it to be false. This is nothing new. For, at the trial, the defendants, on cross-examination, had brought out the details of Greenglass' education, with the patent purpose of persuading the jury that he had lied. In support of their renewed assertion of his perjury, defendants, on the § 2255 motion, presented the affidavits of four scientists

who express the opinion that Greenglass, with his limited education as shown at the trial, could not have made the sketches from memory. Since none of them knew Greenglass, none was in a position to give an opinion about the quality of his memory which, no matter what his education, may have been amply sufficient for this purpose. As additional evidence concerning Greenglass' memory, these opinions, assuming *arguendo* they would be admissible at a trial, are wholly inadequate to justify a new trial. The affidavits bear solely on the credibility of his testimony and that issue was properly submitted to the trial jury for decision. As to this specification the moving papers were insufficient on their face.

[10] The third specification relates to the rebuttal witness Schneider. He was a photographer. He testified that in May or June 1950 Mr. and Mrs. Rosenberg and their two children came to his shop and had passport photographs taken. He was asked whether that was the last time he had seen Julius Rosenberg "before today," and he replied "That's right." In fact he had been brought into the court room by an FBI agent the day before he testified and had identified Rosenberg at that time. Counsel lays stress upon the word "today" to prove the testimony perjurious, but on cross-examination of Schneider at the trial both court and counsel treated the question as meaning "before the trial." Judge Ryan was correct in ruling that there was not the slightest evidence that Schneider's testimony was intentionally false and that in any event it was on an immaterial point, *i. e.*, identification of the Rosenbergs as persons whose pictures he had taken, since the Rosenbergs had not denied that they might have gone to his shop for that purpose, although Julius Rosenberg categorically insisted that they were not passport pictures.

3. Alleged character of information transmitted. The petitioners' next point is that their conviction should be set aside because one item of information classified as secret which they were charged with

having conspired to transmit to Russia, was so generally known that transmitting it was not forbidden by the Espionage Act. This matter was thoroughly discussed by Judge Ryan. We have nothing to add to his opinion, except to say that *United States v. Heine*, 2 Cir., 151 F.2d 813, certiorari denied 328 U.S. 833, 66 S.Ct. 975, 90 L.Ed. 1608, upon which the appellants rely, is so different in its facts as to be completely inapposite.

[11,12] 4. The treason clause of the Constitution. Appellant Sobell in his § 2255 petition advances an additional ground for relief which we understand to be as follows: As to him the evidence showed at most "treachery and general intent to betray"; such an intent does not suffice to prove the specific intent required by the Espionage Act but would meet only the general intent called for by the treason clause of the Constitution; and there was here no compliance with the procedural demands of that clause. This contention raises a question of law as to which there was no need for the taking of evidence on the motion. It could have been raised on the prior appeal in support of the argument then made as to the insufficiency of the evidence to prove specific intent which we then held was adequately proved. It was raised before the Supreme Court in the petition for rehearing which was denied. Assuming without decision that nevertheless it may now be raised in its present form by a motion under § 2255, we hold that it is without merit.

[13] 5. Also without merit is the contention that the court erred in permitting the transfer of Sobell from New York to Alcatraz, California, pending the presentation of his petition and in declining to direct his return while it was under consideration. Since no issues were raised which required his presence as a witness, it does not appear that his absence was in any respect harmful. See *United States v. Pisciotta*, 2 Cir., 199 F.2d 603.

The orders on appeal are affirmed.

13. Gulf Research & Development Co. v. Leahy, 3 Cir., 1951, 193 F.2d 302, affirmed 1952, 344 U.S. 861, 73 S.Ct. 102, rehearing denied 1952, 344 U.S. 900, 73 S.Ct. 273. Petition to compel district judge to vacate his order denying change of venue under § 1406a. Denied.

14. All States Freight v. Modarelli, 3 Cir., 1952, 196 F.2d 1010. Petition to compel district judge to order a transfer under § 1404a. Denied.

15. Mifflinburg Body Works, Inc., v. Murphy, 3 Cir., 1952, 197 F.2d 417. Petition to compel district judge to vacate his order dismissing a petition for corporate reorganization. Dismissed. (Per Curiam.)

16. Petition of Nelson, 3 Cir., 1952, 199 F.2d 878. Petition to direct district judge to change venue because of high feeling against defendant in the community. Denied. (Per Curiam.)

The petition for mandamus will be denied.



SLACK v. UNITED STATES.
No. 11684.

United States Court of Appeals
Sixth Circuit.
April 4, 1953.

Defendant was convicted in the United States District Court for the Eastern District of Tennessee, Robert L. Taylor, J., of

1. "If two or more persons conspire to violate the provisions of sections 32 or 33 of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this chapter shall be punished as provided by * * *. Section 88 of Title 18, Ch. 30, Title I, Sec. 4, 40 Stat. 219, June 15, 1917.

violating espionage statute, and he appealed. The Court of Appeals, Martin, Circuit Judge, held that record established the defendant had the effective assistance of counsel as guaranteed by the federal constitution.

Judgment affirmed.

Criminal Law ⇐641(I)

Record established that defendant, who pleaded guilty to charge of violating espionage statute, had the effective assistance of counsel as guaranteed by the federal constitution. Act June 15, 1917, 40 Stat. 218, 219; 18 U.S.C.A. § 794; U.S.C.A. Const. Amend. 6.

Irving Harris, Cincinnati, Ohio, Alfred D. Slack, Atlanta, Ga., on brief, for appellant.

Ferdinand Powell, Jr., Knoxville, Tenn., John H. Reddy, Knoxville, Tenn., on brief, for appellee.

Before SIMONS, Chief Judge, and MARTIN and McALLISTER, Circuit Judges.

MARTIN, Circuit Judge.

This is the second appeal by Alfred Dean Slack from a denial of his motion in the United States District Court for the Eastern District of Tennessee to vacate a judgment of conviction and a sentence of fifteen years' imprisonment there imposed upon his plea of guilty to the violation of Section 34, Title 50, United States Code [1946 Ed.], by conspiring with others to violate sub-section (a) of Section 32, Title 50, United States Code.¹

Sec. 32. "Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, pho-

On the first appeal, this court, on motion of the United States Attorney, remanded the cause for a new hearing under the provisions of and in accordance with the procedure established in Section 2255, Title 28, United States Code. The District Attorney based his motion, which was granted, upon the fact that appellant had no notice of and was not present at the hearing and did not have the effective service of counsel. We agreed with the District Attorney that the case fell squarely within the holding of the Supreme Court in United States v. Hayman, 342 U.S. 205, 72 S.Ct. 263, 96 L.Ed. 232, which necessitated the remand. See Slack v. United States, 6 Cir., 196 F.2d 493.

At the hearing held in the district court pursuant to our mandate, appellant was ably represented by a skillful and combative attorney, appointed by the court, and was given full and adequate opportunity to present evidence in support of his motion to vacate the sentence. The hearing consumed several days and has been recorded in a typewritten transcript of the proceedings, setting forth the testimony in question and answer form totaling 534 pages, which has been carefully read and duly considered. Appellant himself testified at length. His wife also testified in his behalf.

The Government put on the witness stand three special agents of the Federal Bureau of Investigation, a former special agent of that bureau, the two attorneys appointed to advise with and represent appellant before and at the arraignment when he pleaded guilty, an assistant United States Attorney, and a former United States Attorney for East Tennessee. These witnesses were rigidly cross-examined by appellant's attorney. Numerous exhibits were introduced in evidence.

After the proceedings had been concluded, the District Judge, who with obvious patience had given a considerate hearing to the evidence introduced and to the contentions of petitioner and his attorney, filed a well prepared opinion, expressly adopted

as his findings of fact and conclusions of law. It was adjudged that the motion of appellant to vacate or set aside the judgment and sentence be overruled and denied on its merits.

In his opinion, the District Judge summarized and rejected the argument of appellant that his constitutional rights had been denied and infringed from the time he was first approached for questioning by agents of the Federal Bureau of Investigation until he was committed to prison under judgment of sentence. He had argued: that he was arrested without warrant, questioned unlawfully, and transferred from the State of New York to Knoxville, Tennessee, without having the benefit of counsel to which he was entitled; that he was neglected by the attorneys appointed to represent him in Knoxville, and denied his request for substitution of attorneys; that he was kept under suicide guard and questioned repeatedly by the F. B. I. Agents; that he was advised by his counsel that his case would be thrown out of court and subsequently told by the lawyer that a deal had been made with an assistant United States Attorney whereby, upon a plea of guilty, appellant would be sentenced to only ten years' imprisonment.

As pointed out by the United States District Court, the record shows that in all proceedings in New York appellant had been appropriately advised of his constitutional rights by the officials who questioned him, and had understandingly and voluntarily waived his right not to be questioned as to the disclosures which he made and his right to have the benefit of counsel before voluntarily being transferred to Knoxville, Tennessee. He admitted on the witness stand his signature to the statements which he voluntarily made in writing. At his request upon arriving in Knoxville, the Court shortly thereafter appointed able and highly respected members of the bar to represent him and, while he was kept under close surveillance during his detention in prisons at Greeneville and Knoxville, there was no

tograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by im-

prisonment for not more than twenty years * * *." [See 1948 Revised Criminal Code, 18 U.S.C.A. § 794].

guilty was in any degree attributable to this circumstance. The District Court found further that, upon advice of counsel, appellant had responded voluntarily to frequent questioning by agents of the Federal Bureau of Investigation; and that all his admissions were voluntarily made with knowledge that his statements might be used against him, but that they were not so used, there being no evidence that prior statements made by him were a coercive factor in inducing him to plead guilty. It was explained by the District Judge that he had assumed that appellant had no further complaints of inattention on the part of his attorneys after their conference with him, and that the reply of the Judge to appellant's letter of complaint gave notice of this fact. The opinion asserted further that the District Judge had not received a second letter alleged by appellant to have been written by him requesting substitution of counsel.

The Judge pointed to the testimony of appellant's former attorneys, showing that appellant had been represented by counsel within the meaning of the Constitution and that his plea of guilty could not be attributed to lack of counsel or to advice of counsel in any sense lacking in fidelity, care or understanding. It had been made plain to appellant that the recommendation of a ten-year sentence by the District Attorney would not be binding upon the Court and might be rejected; and the defendant had expressed his determination to take a chance on the rejection by the Court of the recommendation of the Government's attorney. It was found upon the record that the defendant had entered an unqualified plea of guilty and that he had had ample time within which to withdraw his plea if he had so desired, but that he had not expressed any wish to do so. He entered his plea of guilty on September 18, 1950, and was sentenced on September 22, 1950.

All the foregoing findings of fact by the District Court were amply supported by substantial evidence and were certainly not clearly erroneous.

The District Judge received from the defendant a letter dated September 19, 1950,

the action for which I am legally liable now was a report on the manufacture of the explosive produced in Kingsport in 1943." He wrote that this explosive had been known to scientists since 1899; that it had been used by the Germans in World War One and that its composition, properties and method of manufacture had been described in 1925 in the Journal of The American Chemical Society. The opinion states that this letter, the contents of which were brought to the attention of appellant's attorney prior to his plea of guilty, is made in the present proceeding the cornerstone of his motion to vacate the judgment of conviction and sentence.

The District Judge analyzed the case as reducing to the crucial question of whether the conspiratorial actions of the defendant were a violation of the law, it being the theory of appellant on his motion to vacate that furnishing something already known or available to the recipient from public sources does not constitute furnishing information within the meaning of the federal statute upon which the indictment was based. The Court stated, upon the authority of *United States v. Heine*, 2 Cir., 151 F.2d 813, that "as an abstract proposition this theory would undoubtedly have merit, as where the recipient by his own efforts could have gleaned the information from public sources"; but that there was no merit in the contention of appellant where, as in the case at bar, the thing furnished reveals facts not intrinsic in the thing itself.

The District Court reasoned thus: "In all probability, the recipient of information relative to the formula of the explosive known as RDX could have obtained the formula from public sources, or already had it at his disposal. The prisoner furnished for transmittal to the Russians a report on the manufacture of RDX. He testified that he obtained his information from public sources, mainly, if not entirely, while he was in Cincinnati. But at the time he furnished the report to his co-conspirator he was employed within what by common knowledge was a closely guarded munitions plant where an explosive was being manufactured. He was familiar with certain

phases of the manufacture of the explosive. The report he furnished is not here in evidence, but it is a certainty that he had opportunity to check matters of report obtained outside with those observed inside the plant at Kingsport. It is in evidence that under cover of a pass issued to him as an employee he obtained a sample of the explosive which he knew or assumed to be RDX from a storage department within the plant, which sample he furnished to his co-conspirator. From this sample the recipient could have determined whether the product was, or was not, RDX. Thus, in furnishing the sample, he furnished the means by which through chemical analysis it could be determined what in fact was being manufactured in the Kingsport munitions plant, known as the Holston Ordnance Works. This was the furnishing of information relating to the national defense and was a violation of the espionage law set out in the Code sections of the indictment. See *Gorin v. United States*, 312 U.S. 19 [61 S.Ct. 429, 85 L.Ed. 488]."

The opinion of the trial court concluded with the assertion that, upon cross-examination, appellant had admitted stating to his attorneys that, if doing the things hereinabove set forth constituted a violation of law, he was guilty; that, when arraigned, appellant had entered an unqualified plea of guilty which he had time and opportunity to repudiate, but did not; that the act committed by him fell within the inhibitions of the espionage statute; and that, examined in retrospect, his plea of guilty must be held to have been a voluntary and understanding plea. The final conclusion of the District Court was that no constitutional right of appellant had been denied or infringed; and that he had received every requisite of due process of law guaranteed by the Constitution. Accordingly, appellant's motion to vacate the judgment of conviction and sentence was overruled.

On this appeal, a competent attorney was appointed by this court to represent the appellant, a highly intelligent and well educated man who also filed a brief in his own behalf. The crux of the argument made in behalf of appellant is that he did not have

the effective assistance of counsel as guaranteed by the Sixth Amendment to the Federal Constitution, in that he was not properly advised by counsel originally appointed to represent him in the trial court of the exact nature and meaning of the charge laid against him in the indictment; and that had he been properly informed, he would not have pleaded guilty. The point emphasized is that had he been aware of the interpretation placed upon the espionage law by the Court of Appeals for the Second Circuit in *United States v. Heine*, 151 F.2d 813, appellant would not have pleaded guilty.

The argument is not well grounded, for the reason that the Heine case is readily distinguishable from that at bar. It becomes immaterial, therefore, whether or not this court agrees with the doctrine laid down in that case, which we do say, however, is open to serious challenge.

In the Heine case, it was held that prohibition under the Espionage Act, Sections 32 and 34, Title 50, U.S.C.A., against the dissemination of information relating to the national defense was not inclusive of information from sources lawfully accessible to everyone and, therefore, that a German-born American citizen who was engaged in collecting and transmitting to Germany all available information about American production of airplanes, so that Germany should be advised of that feature of American defense in event of war, could not be lawfully convicted of violating the Espionage Act.

Here, the record shows that the attorney for appellant was told by him that he had furnished Harry Gold with a confidential report in writing concerning the manufacture of the explosive RDX in the Holston Works at Kingsport. This munitions plant was carefully guarded and screened against disclosure of the product being manufactured there and in what quantity it was being manufactured. Moreover, appellant admitted that he stole and passed along to this spy for Russia a specimen of the explosive being manufactured in that closely guarded plant. The sample of the end product there manufactured, showing as

it did precisely what was being produced, was secret information not obtained from public domain of knowledge. Appellant has stressed the proposition that the information which he passed along to his co-conspirator Gold was derived from sources of public information. This is utterly inconsistent with his prior statement to his attorney that he had furnished Gold a sample of the product and a confidential report in writing on the secret manufacture of the explosive in the Holston Ordnance Works.

It seems manifest that the proposition now advanced by appellant is a concocted afterthought. Moreover, the argument of appellant will not stand up in the light of the opinion of the Supreme Court in *Gorin v. United States*, 312 U.S. 19, 30, 61 S.Ct. 429, 85 L.Ed. 488, where it was made plain that the evil which the Espionage Act punishes is obtaining for or furnishing to a foreign government guarded information, "either to the damage of our nation or to the gain of another country."

The attack which appellant makes upon the competent and conscientious counsel originally appointed by the District Judge to advise him of his rights and to represent him upon his arraignment and thereafter, evinces the ingratitude which might be expected of a traitor to his country—a man obviously without principle or honor. Ray Jenkins, the chief counsel appointed to assist appellant in his defense, has practiced law in Tennessee for more than thirty years and has appeared most frequently as the advocate of persons on trial for serious offenses in the criminal courts, both state and federal. He has earned and enjoys a fine reputation for professional ethics and personal integrity, and is generally regarded as one of the ablest trial lawyers in Tennessee. Kyle King of Greenville, Tennessee, the junior counsel appointed by the District Court to assist appellant in his defense, is thirty-two years of age and was admitted to the practice of law in 1941. He has engaged actively in practice since 1946.

Attorney Jenkins testified that appellant told him in detail of how, while an em-

ployee of the Eastman Kodak Corporation, he had furnished Bridges, knowing him to be an agent of the Russian Government, information of a military nature, for which appellant was paid cash. He furnished this man numerous confidential reports in writing. Appellant had told Mr. Jenkins and his co-counsel that, when Bridges died, he continued to furnish reports, specimens and information, for which he was paid money, to a successor paid spy of the Russian Government, namely, Harry Gold. Gold had visited appellant's home while he was in Cincinnati. Mr. Jenkins testified further: "He told Mr. King and myself of how he after he had become employed at Holston Ordnance Works in Kingsport, how he gained admission to a certain part of that plant where his work did not carry him. And he was working in an entirely different part of the plant but knew what was being done, that it was a military plant, where explosives were made; that the personnel was highly screened, and that the plant was closely guarded. That upon gaining admission to that part of the plant where the real explosive was stored, to wit, RDX, he while the guards were not looking secretly possessed himself of a quantity of the explosive known as RDX, put it in his pocket, and for the purpose of delivering it to Harry Gold, and that later and shortly thereafter that same specimen was delivered by Mr. Slack to Harry Gold at Kingsport, and at which time he, at Gold's insistence, furnished him with a confidential written report on the manufacture of an explosive known as RDX in Kingsport, Tennessee."

Finally and after an exhaustive explanation of our client, and as sympathetic as we knew how to conduct, and one which was conducted with the idea solely and only idea of what was the best thing to do for our client, I recall that I said to Mr. Slack this, 'Do you realize, Mr. Slack, that what you have told Mr. King and myself makes you guilty of furnishing information to a foreign government, in connection relating to the national defense, or conspiring with Gold to do so?' And he said, 'Why, certainly I realize that,

Gentlemen. I have realized that from the very beginning. I have no thought other than that I am guilty. I know I am. I have confessed everything to the F. B. I. agents and I want you as my attorneys to plead me guilty and to do it forthwith and let me begin serving my sentence and get it over with and get it off my conscience.' That was the culmination of some four hours talk with the defendant Slack. Mr. King and I left shortly thereafter. We discussed the case together as attorneys. We looked in view of our instructions from our client that the best service we could possibly render him was to make, to get the best recommendation possible from the District Attorney. That was undertaken shortly thereafter."

Attorney Jenkins testified further that never at any time did he refuse the request of appellant to visit him at the county jail, although he did not always go immediately; that he had not made a social companion or confidant of appellant, but as the attorney had complied with every request made of him during the intervening time between his appointment by the court and the date judgment was pronounced by the District Judge at a court session in Greeneville, Tennessee. He asserted that he had used his best efforts to impress upon the assistant United States Attorney all the mitigating circumstances in behalf of his client, so as to obtain a recommendation for clemency from the Department of Justice in Washington. He denied emphatically that he ever told appellant that "his case would be thrown out of court." He said that he had never represented a keener, more intelligent man than appellant, who could not have misunderstood him or Mr. King when they stated to appellant that what he had told them constituted guilt of the offense charged. He stated that he made so many trips to the District Attorney's office in behalf of appellant, trying to obtain a commitment for a recommendation of light punishment, as to constitute himself almost a nuisance. He explained to appellant that the recommendation of the District Attorney upon authorization from the Department of Jus-

tice at Washington, that appellant be sentenced to ten years' confinement, would not be binding upon the United States District Judge; and that his client well understood this when he pleaded guilty. Attorney Jenkins denied positively that he had advised appellant not to make a personal statement to the District Judge when he entered his plea of guilty.

The testimony of Mr. Jenkins is corroborated in all material aspects by that of Mr. Kyle King, the other attorney appointed to represent appellant. It should be observed that, when the District Judge asked the appellant whether he had anything to say before judgment was pronounced, Slack answered, "No, Your Honor."

The record discloses that Attorney Jenkins made a most eloquent appeal in open court for the exercise by the District Judge of clemency toward his client. He stressed the changed conditions in this country's attitude toward Russia from 1943, when the offense was committed, to the fall of 1950, when appellant entered his plea of guilty to the charge of conspiracy to violate the espionage laws of the United States. He implored the sentencing judge to erase and disassociate the events of the last seven years, and "to judge the degree of appellant's guilt as if we were now living at the time of the commission of the offense." He stressed that in 1943 Russia was a friendly ally whose stand at Stalingrad had become "an epoch of raw courage and respect of 150,000,000 people in this country"; and that, then, "the very civilization of this world was tottering at the brink of the precipice." He declared that even with his legal training it would be hard for the judge to erase from his mind "the memories and the knowledge of the events of the last seven years and to go back to 1943," and to pass such sentence upon appellant as would have been considered commensurate with his offense at that time. He then added: "But I believe Your Honor can do it, and will do it." He referred to the spirit of contrition and penitence exhibited by appellant, and to how the F. B. I. agents had related that they had received heartiest and most complete cooperation

from him. The attorney described the case as a classic example of the exhibition of the greatest fear of mankind, which he termed the "fear of adverse publicity." He stated that appellant had been "virtually blackmailed into the commission of an offense because he had become involved with a man [Harry Gold] who the District Attorney says, and who we all know is a thousand times more steeped in moral turpitude than is Alfred Dean Slack." Mr. Jenkins said further that appellant knew it was wrong "to give even our closest ally a military secret" and had refused several times to do so; but had finally succumbed to the pressure applied by Gold to get what he wanted: the "know how" and the means and method of manufacturing RDX. He stated that appellant had quarreled violently with Gold and thrice had refused to do his bidding, but finally had succumbed to the tentacles of a man who had "the goods on him" and could expose, ruin and destroy him, not only with his wife and children, but with his father, mother, neighbors and fellow-countrymen. The attorney called attention to the fact that appellant had finally been blackmailed by Gold, through fear of exposure, into commission of the offense; and that "the threat of utter destruction in the mind of the American people, the threat of blasting all of his hopes and ambitions and his future by newspaper publicity was as strong as if Gold had put the point of a pistol to his temple and said, 'Hand over to me this sample of RDX.'"

Four days later, before sentence was imposed, Attorney Jenkins presented testimonials from numerous friends and neighbors, including the pastor of appellant, as to his good reputation and loyalty as a citizen. In concluding his plea for mercy for his client, the astute attorney again reminded the court that appellant had been under the dominance of Gold and that, at the time he gave Gold the secret formula, "we were fighting side by side and arm in arm with the Russian people." He finished his strong appeal with the statement that, at heart, Slack had not wanted to injure

his country to the advantage of even an ally.

The presently changed and malicious attitude toward his conscientious and able lawyers is evinced by the fact that, on September 18, 1950, the day upon which Mr. Jenkins had made his eloquent plea for mercy, appellant wrote him and associate counsel King the following communication: "Gentlemen: This letter is an attempt to partially express my deep appreciation to you and to Mr. King for your labors on my behalf.

"I had never realized before that members of the legal fraternity did so much for those who are without funds but yet need a champion.

"Your help, your counsel and your representation were far more than I had expected; your efforts today were magnificent. For now, I most sincerely thank you.

"(Signed) A. D. Slack."

All other points argued on this appeal are regarded as too insignificant to merit discussion, none being well grounded in law.

Notwithstanding the eloquent appeal made by Attorney Jenkins for leniency toward his client, the District Judge stepped up the sentence recommended by the United States Attorney upon the authorization of the Department of Justice from ten to fifteen years' imprisonment and presented logical reasons for his action, which of course rested in his sound discretion. When sentencing appellant, he thus addressed him: "You are represented by learned and experienced counsel. They have presented your case to the Court in a most appealing and able manner. The crime that you have committed is not an ordinary offense against the Federal criminal laws. It is of national rather than local significance. It therefore involves relationships broader than the jurisdiction of this Court. It touches upon matters within the peculiar field of the Department of Justice and upon which representatives of that Department are especially qualified to speak.

tions with which the Department of Justice and other departments of the Government as well are concerned, the Court does not regard it as purely a local offense and accordingly does not believe that it should be dealt with as such. For this reason the Court welcomes the recommendation from the Department of Justice and treats that recommendation with full confidence and respect. With due deference to the Department and the Government's attorneys, I have determined to depart from this suggestion or recommendation. Viewed as an isolated matter, this crime is shocking and can be contemplated only with detestation. It is ironical, however, from the standpoint of this defendant that he committed his crime at a time when the United States and Soviet Russia were allies, but stands before the bar of justice to receive his punishment at a time when the United States and Soviet Russia are stirred by mutual distrust, torn by the clash of opposing ideologies and face each other across the world under the threat of devastating war. The human mind changes with the winds of passion. It is the quality of justice that it does not permit itself to be swayed unduly by the shifting tides.

"Fifteen years' imprisonment is a long time in any life and in any period of history. For this defendant, it is not too much, I believe, in consideration of all the circumstances. It is enough."

The consideration and due process of law liberally accorded this self-confessed traitor to his country, Alfred Dean Slack, from the inception of the charges against him is illustrative of substantial justice as administered in our own country, in direct contrast to the denial of such in the country to which he exposed our military secrets. He has been permitted even to castigate outstandingly able, conscientious and eloquent attorneys, appointed to defend his rights, who righteously performed their duties. On the record in this case, he is clearly guilty beyond a reasonable doubt of the offense to which he pleaded guilty and for which he was lawfully sentenced.

Let the judgment of the District Court be affirmed.

AMERICAN UNIVERSAL INS. CO. V.
STERLING et al.

No. 10798.

United States Court of Appeals
Third Circuit.

Argued Dec. 5, 1952.

Decided March 20, 1953.

Suit to recover damages for breach of duty of cooperation imposed on insureds by fire policy and subrogation and loan receipts. The United States District Court for the Middle District of Pennsylvania, Albert L. Watson, Chief Judge, 104 F.Supp. 478, rendered judgment dismissing complaint for want of jurisdiction in that plaintiff was not authorized to do business in Pennsylvania, and plaintiff appealed. The Court of Appeals, Biggs, C. J., held that where insurer offered to prove that policy represented excess insurance which could not be procured from companies authorized to do business in Pennsylvania, failure to allege such facts in complaint did not warrant dismissal thereof.

Judgment vacated and cause remanded with directions.

1. Courts ⇨259, 359

Where federal jurisdiction of suit by foreign insurance company not authorized to do business in the state was based on diversity of citizenship, state law controlled, and if such suit could not be maintained in courts of the state, it could not be maintained in federal courts of such state.

2. Insurance ⇨26

Suit by foreign insurance company to recover damages for violation of duty of cooperation imposed on insureds by fire policy and subrogation and loan receipts was based on insurance contract within Pennsylvania law precluding maintenance of suits in courts of Pennsylvania on insurance contracts issued to Pennsylvania citizens on property within the commonwealth by foreign companies which have not complied with Pennsylvania statute. 40 P.S.Pa. § 26.

3. Insurance ⇨26

Pennsylvania statutes permitting licensed brokers to place insurance which cannot be procured from companies au-

the Court of Appeals did not provide for interest. That this is the proper construction to be placed on the Briggs case is confirmed by a reading of the dissenting opinion in that case. The dissenters clearly saw that the Supreme Court was deciding the question: 'whether the appellate court's mandate includes interest provided by 28 U.S.C. § 811' (the predecessor of 28 U.S.C. § 1961 which is here involved) 'although the mandate makes no explicit mention of interest.' 334 U.S. at 308 [68 S.Ct. 1039]. The majority of the Court held that it did not and this court is bound by that ruling."

[1] We agree with the reasoning and holding of the district court. It was without authority to modify the mandate of this court to allow interest on the judgments in question.

In the present appeal, plaintiffs renew their reliance on the substantive law of Indiana as they did in the second appeal. They cite the Indiana interest statute, Ind. Ann. Stat. § 19-2002 (Burns' 1950). However, we took notice of that statute before and held in effect that it could not control the course of this federal litigation. 282 F.2d at 806, 807.

At the oral argument in the instant appeal, plaintiffs presented a motion asking this court to recall and amend the first mandate issued by us on September 8, 1959 following our decision in *Lee v. Terminal Transport Company*, 7 Cir., 269 F.2d 97 (1959). This motion to recall was filed six days before oral argument and was answered by defendant on the day of oral argument.

[2] The purport of the motion to recall our mandate is that we should now amend the same "so as to provide for interest in accord with the Indiana statute." Thus, plaintiffs for the first time in the long history of this litigation now recognize that this court is the only source of authority to modify its own mandate. We think this present motion comes too late.

Plaintiffs have waited approximately 29 months from the time the mandate issued to seek this relief. The day after the mandate issued, the district court vacated its prior judgment and entered judgments for plaintiffs totaling \$103,000. On the same day, defendant paid the full amount thereof to the clerk of the district court and eight days later paid to the clerk costs of \$1457.95. The full amount of \$103,000 has been available to plaintiffs since that time. Defendant should not now be penalized because of plaintiffs' subsequent abortive actions.

Since we have held in the instant appeal that the district court did not err in entering the order appealed from, we cannot in good conscience allow the relief requested now, for the first time, by way of recalling and amending our mandate issued September 8, 1959. Accordingly, plaintiffs' motion to recall and amend the mandate issued in Nos. 12431 and 12432, 7 Cir., 269 F.2d 97, is denied.

For the foregoing reasons, the order from which this appeal is taken is affirmed.

Affirmed.



UNITED STATES of America,
Appellee,

v.

Robert SOBLEN, Appellant.
No. 207, Docket 27179.

United States Court of Appeals
Second Circuit.

Argued Feb. 6, 1962.

Decided March 13, 1962.

Certiorari Denied June 25, 1962.

See 82 S.Ct. 1585.

Prosecution for conspiracy to obtain information respecting the national defense of the United States and for conspiracy to transmit information re-

lating to the national defense. From a judgment of the United States District Court for the Southern District of New York, William B. Herlands, J., 199 F. Supp. 11, and from denial of a motion for new trial on newly discovered evidence, 203 F.Supp. 542, the defendant appealed. The Court of Appeals, Swan, Circuit Judge, held that there was no impropriety in receiving evidence of conspirators' activities prior to beginning of conspiracy charged in indictment where evidence was relevant to show motivation and community of interest among conspirators, and newly discovered evidence was merely cumulative and impeaching and even if received and believed, a different result could not be anticipated.

Affirmed.

1. Conspiracy **47**

Evidence was sufficient to sustain conviction for conspiracy to obtain information respecting national defense of the United States and for conspiracy to transmit information relating to the national defense. 18 U.S.C.A. §§ 793, 794(a).

2. Criminal Law **1134(3)**

Where defendant had been convicted of conspiracy to obtain information respecting the national defense and of conspiracy to transmit information relating to the national defense, and where defendant had been sentenced to 10 years on count one and life imprisonment on count two, it was not necessary to determine if prosecution under count one were barred by statute of limitations. 18 U.S.C.A. §§ 793, 794(a).

3. Criminal Law **673(2)**

Evidence relating to criminal conduct and political activity of alleged co-conspirators during the period before the conspiracies began was properly admitted to show motivation and community of interest on the part of the conspirator where instructions were given making it clear to jury that evidence was to be considered only for such purpose and that defendant was not on trial for

his activities prior to conspiracy alleged in indictment. 18 U.S.C.A. §§ 793, 794.

4. Criminal Law **1036(1)**

Testimony of government witness in prosecution for conspiracy to obtain and transmit national defense information that, subsequent to conspiracy for which defendant was indicted, witness and two other members of alleged conspiracy had pleaded guilty to charge of espionage did not constitute such plain error as reviewing court would notice notwithstanding defendant's failure to object to testimony when it was given. Fed. Rules Crim. Proc. rule 52(b), 18 U.S.C.A.

5. Criminal Law **423(1), 424(1)**

Exception to hearsay rule allowing coconspirators to testify to out-of-court statements extends only to statements made during the life and in furtherance of the conspiracy, and to admit hearsay of conversation after the conspiracy is over is error.

6. Criminal Law **673(1)**

Admission of hearsay of conversations occurring at time when prosecution contended conspiracy continued was not error even though defendant contended that conspiracy had expired at an earlier date, where judge charged that existence of conspiracy must be determined without regard to and independently of statements and declarations of others but, having determined that defendant was member of conspiracy, jury could then consider the declarations of other co-conspirators made during existence of conspiracy.

7. Criminal Law **700**

Although prosecution has duty to disclose, on its own initiative, exculpatory facts in its exclusive control, it has no such burden when facts are readily available to a diligent defender.

8. Criminal Law **700**

Failure of government to call to attention medical report concerning mental condition of government witness did not violate elementary fairness or vitiate trial where government had several times referred to prior decision in which con-

viction based upon testimony of same witness had been upset for failure to disclose medical report and where all facts of mental condition of witness were, therefore, a matter of public record.

9. Criminal Law ⇐700

It is not error for prosecution to fail to disclose whereabouts of person mentioned in testimony of government witness, especially where, after testimony of witness, whereabouts of mentioned person was made known and where defense counsel made no request for continuance of trial so as to locate him although he could have been located within a minimum of time and effort.

10. Criminal Law ⇐938(1)

Convicted defendant was not entitled to new trial on basis of newly discovered evidence where witnesses were available during trial, where testimony was merely cumulative and impeaching, and where, even if testimony of new witnesses were received and believed, different results could not be anticipated.

Ephraim London and Joseph Brill, New York City, for appellant. Helen L. Bittenwieser and Jordan Derwin, New York City, on the brief.

Robert M. Morgenthau, U. S. Atty. for Southern Dist. of New York, for appellee. David R. Hyde and David Klingsberg, Asst. U. S. Attys., of counsel.

Before LUMBARD, Chief Judge, and SWAN and WATERMAN, Circuit Judges.

SWAN, Circuit Judge.

The indictment alleges that the conspiracies began in January 1940 and continued to the return of the indictment on November 29, 1960. Eighteen co-conspirators were listed but were not made defendants. The trial began June 19, 1961, was concluded July 13, and sentence was imposed on August 7—ten years on count 1 and life imprisonment on count 2. Defendant duly appealed and is free on \$100,000 bail.

On October 9, 1961 defendant moved under Rule 33, F.R.Crim.P., 18 U.S.C.A., for a new trial on newly discovered evidence. After hearing witnesses Judge Herlands wrote a lengthy opinion denying the motion on November 3. Defendant has also appealed from this order.

The appellant presents four points: (1) insufficiency of the evidence to sustain the jury's verdict; (2) count 1 was barred by the statute of limitations; (3) errors in admitting prejudicial testimony; and (4) error in denying the motion for a new trial.

(1) *Alleged insufficiency of the evidence.*

[1] Defendant did not testify nor did he call any witness. He was represented by two experienced trial lawyers. Their strategy was to endeavor by cross-examination of witnesses for the prosecution to prove that the conspiracy, if any, in which defendant took part did not involve getting information about the *national defense* of the United States, but about the Trotskyite wing of the Party Mensheviks, and Germans, living in the United States. Counsel seem to have conceded that defendant was party to a conspiracy to obtain information for Russia respecting matters other than national defense. At least there was no contradiction of testimony that he was paid \$100 or \$150 per month by co-conspirators for reporting to them during years prior to the time the conspiracy is claimed to have ended in 1945.

The first witness for the prosecution was defendant's brother Jack Soble. He was examined and cross-examined at great length. He testified to meeting Beria of the GPU (Russian Secret Service) in 1940 and to being told by Beria that he wanted him and his brother, Robert, the defendant, "to go abroad to work for us to gather *any* information of *any* value to the Soviet Union." [Italics added.] The quoted purpose certainly cannot reasonably be construed to have excluded the gathering of national defense information. Beria did not say how they would go or where but offered to let their parents and relatives go with

them because the parents are anti-communists" and will be a "good cover." Of course Jack's conversation with Beria did not commit Robert to the conspiracy, but shortly thereafter Jack visited his brother in Lithuania and learned from him that agents of the GPU had made him a similar proposition. Jack also testified to their leaving Russia via Vladivostok, getting to the United States via Japan and meeting in New York City various "contacts" to whom they made reports. According to Jack's testimony Robert's contact "was Zubilin's wife Helen. He told me this many times on several occasions." ¹ He further testified that he had many conversations with Robert "about my work in the Trotskyite field, and his work in the O.S.S."

Mrs. Beker, also listed as a co-conspirator, testified that the defendant caused her to meet Dr. Hirschfeld, head of an O. S. S. section compiling information on European politicians, and told her Hirschfeld worked for the O. S. S.; that she received written reports from him in 1943, 1944 and the early months of 1945 which she passed on to the defendant; that Hirschfeld reported on what some of his co-workers in O. S. S. were doing and the last two or three reports referred to an important military weapon being developed in the far west. Thus there was testimony that the conspirators infiltrated the O. S. S. and secured information from persons working there. That information obtained from O. S. S. employees was classified as secret was demonstrated by the testimony of Mr. Doering, general counsel of O. S. S.

1. Both Zubilin and his wife were listed in the indictment as co-conspirators.
2. Judge Herlands charged the jury as follows:

"Whether or not the information and documents allegedly sought to be obtained and transmitted by the defendant and his alleged co-conspirators concerned, regarded or was connected with the national defense is a question of fact solely for the determination of you, the jury, taking into consideration all the circumstances of the alleged crime and considering the alleged source, origin, char-

acter and utility of the information and documents. * * * You may also consider the testimony that the names of certain personnel and their functions within O. S. S. were classified information. "If you find that the only information or documents which the defendant allegedly gathered and transmitted in this case were lawfully accessible to anyone who was willing to take the pains to find, sift and collate it or them, then the defendant would not be guilty of transmitting or obtaining and receiving national defense information."

information was classified as secret distinguishes this case from *United States v. Heine*, 2 Cir., 151 F.2d 813, cert. den. 328 U.S. 833, 66 S.Ct. 975, 90 L.Ed. 1608, upon which appellant places reliance. Moreover, the information as to how the O. S. S. carried on its work and who did what was in itself a matter of national defense, as was also the information with respect to the development of an important military weapon in the far west, as to which Mrs. Beker testified. Her testimony, if credited, was alone enough to justify the verdict. *Gorin v. United States*, 312 U.S. 19, 61 S.Ct. 429, 85 L.Ed. 488, affirming 9 Cir., 111 F.2d 712 is a leading case on the Espionage Act. There, affirming a conviction for transmitting Naval Intelligence reports on Japanese agents in the United States, the Court said, 312 U.S. at page 32, 61 S.Ct. at page 436:

"It is not the function of the court, where reasonable men may differ, to determine whether the acts do or do not come within the ambit of the statute. The question of the connection of the information with national defense is a question of fact to be determined by the jury as negligence upon undisputed facts is determined."

We are satisfied that appellant's point (1) must be overruled.

(2) *The statute of limitations.*

[2] The appellant contends that prosecution of the conspiracy charged in count 1 is barred by the statute of limita-

acter and utility of the information and documents. * * * You may also consider the testimony that the names of certain personnel and their functions within O. S. S. were classified information.

"If you find that the only information or documents which the defendant allegedly gathered and transmitted in this case were lawfully accessible to anyone who was willing to take the pains to find, sift and collate it or them, then the defendant would not be guilty of transmitting or obtaining and receiving national defense information."

of the barred count requires reversal of the conviction under count 2. Whether or not prosecution under count 1 was barred presents a serious question, but we see no necessity for determining it. Concededly there was no statute of limitations applicable to count 2, and on this count defendant was sentenced to life imprisonment. The sentence imposed on count 1 did not increase defendant's term of imprisonment. Hence, if the count 2 conviction is sustainable, we need not consider the error alleged as vitiating count 1. *Barenblatt v. United States*, 360 U.S. 109, 115, 79 S.Ct. 1081, 3 L.Ed. 2d 1115; *United States v. Bronson*, 2 Cir., 145 F.2d 939, 944. And the same rule has been applied in prosecutions for espionage. *Abrams v. United States*, 250 U.S. 616, 619, 40 S.Ct. 17, 63 L.Ed. 1173; *Pierce v. United States*, 252 U.S. 239, 40 S.Ct. 205, 64 L.Ed. 542; *Gorin v. United States*, 9 Cir., 111 F.2d 712, 722, affirmed 312 U.S. 19, 61 S.Ct. 429, 85 L.Ed. 488.

Assuming *arguendo* that count 1 was barred by the statute of limitations, we cannot see how submission to the jury of that count constituted such prejudicial error as to require reversal of count 2. Appellant has pointed out no proof with respect to count 1 which was not equally admissible with respect to count 2, as was the case in *Flemister v. United States*, 5 Cir., 260 F.2d 513, on which appellant relies. The obtaining of information for the U. S. S. R. (the conspiracy charged in count 1) was a necessary prerequisite to transmitting it (the conspiracy charged in count 2).

(3) *Alleged errors in admitting prejudicial testimony.*

[3] Appellant contends that the trial court committed reversible error in admitting prejudicial testimony relating to defendant and relating to criminal conduct and political activity of the alleged co-conspirators during the periods before the conspiracies began and after they terminated.

Objection was made to the admission of Jack Soble's testimony that he and

Trotskyite wing of the German Communist Party in 1919, when they were studying in Germany. In our opinion there was no impropriety in receiving evidence of the conspirators' activities prior to the beginning of the conspiracy charged in the indictment. The evidence was relevant background to the prosecution's case, to show the motivation and community of interest of the conspirators. How far back one may go is largely a matter within the discretion of the trial judge. See *United States v. Dennis*, 2 Cir., 183 F.2d 201, 231, affirmed, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137. We see no abuse of discretion. Judge Herlands' instructions made it clear to the jury that the evidence was to be considered only for the above-stated purpose, and that the defendant was not on trial for his pre-1940 activities.

[4] As to testimony concerning post-1945 events, appellant complains of testimony by Jack Soble that in 1957 he, his wife and Albam, all members of the alleged conspiracy, pleaded guilty to charges of espionage. When Soble took the stand, the prosecutor immediately brought out that he was serving a seven year sentence for espionage of which he had been convicted in 1957 upon a plea of guilty. Counsel for defendant made no objection to this testimony, doubtless because they thought it would impair with the jury his credibility as a witness. On direct examination he was asked no question to which the answer would bring out that his wife and Albam had been indicted with him and had also pleaded guilty. He volunteered this information with respect to Albam. However, no objection or exception thereto was taken by the defendant, and the first questions put to Soble on cross-examination brought out that his wife and Albam were indicted with him, pleaded guilty and received prison sentences. Under these circumstances we do not think defendant can complain of the testimony as such plain error that we should notice it notwithstanding his failure to object.

52(6) F.2d 792. 31. United States v. Grabina, 2 Cir., 295 F.2d 792.

[5, 6] A more serious error is alleged in the admission of hearsay testimony relating to conversations after 1945, particularly those between Jack Soble and various Russians in 1947. The exception to the hearsay rule, allowing co-conspirators to testify to out-of-court statements, extends only to statements made during the life and in furtherance of the conspiracy; to admit hearsay of conversations after the conspiracy is over is error. *Krulewitch v. United States*, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949). The government contends that the 1947 conversations were offered to prove the continuance of the conspiracy. But that, after all, is the disputed fact. Until and unless it is proven that the conspiracy extended past 1945, hearsay subsequent to that time is inadmissible. Especially where, as here, defendant strongly contends that the conspiracy expired at an earlier date, great care must be exercised to prevent confusion between the purpose of introducing the evidence and its admissibility—which follows, not precedes, the proof of conspiracy.

This objection, however, can be made to all evidence of the acts and conversations of co-conspirators. As Justice Jackson said in *Krulewitch*:

" * * * Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assump-

tion that prejudicial effects can be overcome by instructions to the jury, cf. *Blumenthal v. United States*, 332 U.S. 535, 539, 559 [68 S.Ct. 248, 257 (92 L.Ed. 154)]; all practicing lawyers know to be unmitigated fiction." 336 U.S. 453, 69 S.Ct. 723 (concurring opinion).

However trenchant these criticisms, that question has been decided adversely to petitioner's position since the trial of *Thomas Hardy*, 24 How.St.Tr. 200 (1794); see *Levie, Hearsay and Conspiracy*, 52 Mich.L.Rev. 1159, 1162 (1954). And Judge Herlands gave the instructions required by law when he stated, in his charge to the jury, that:

" * * * In considering whether or not defendant was a member of the conspiracy, you must do so—I repeat: in considering whether or not defendant was a member of the conspiracy, as to that particular element, you must do so *without regard to and independently of the statements and declarations of others*. In other words, you must determine the membership of defendant from the evidence concerning his own actions, his own conduct, his own declarations, or his own statements, and his own connection with the actions and conduct of others. However, once you have determined that defendant was a member of the conspiracy, if you so find, using this test, you may then consider as if made by him the statements and declarations of other co-conspirators, made in furtherance of the conspiracy and *during the existence* thereof as alleged." (Italics added.)

Since the jury must have found that the conspiracy continued past 1945 before it could consider the allegedly prejudicial testimony, to admit it was not error.

(4) *The alleged error in denying the motion for a new trial.*

Defendant's motion for a new trial, from the denial of which he also appeals, was based on two grounds. First, he urged that newly-discovered evidence,

contradicting the prosecution witnesses, would probably prove his innocence, and hence was required "in the interests of justice," 33, F.R.Crim.P. Second, he claimed that the government, by suppressing exculpatory evidence, had violated elementary fairness and vitiated the trial.

[7,8] The first piece of evidence claimed to have been suppressed by the government was a medical report concerning Jack Soble by prison physicians. As to this, defendant does not claim that the government hid the evidence, but only that it failed to bring it to the attention of the court and defense counsel. But the government several times referred to our decision in *United States v. Zborowski*, 2 Cir., 271 F.2d 661, and to Jack Soble's part in that case. There we upset a conviction based on the same Jack Soble's testimony where the government had failed to disclose the reports and certain inconsistencies with grand jury minutes; hence all the facts of Jack's mental condition were, at the time of the trial, a matter of public record. And while the prosecution has the duty to disclose, on its own initiative, exculpatory facts within its exclusive control, *United States v. Zborowski*, supra, it has no such burden when the facts are readily available to a diligent defender. See, e. g., *United States v. Costello*, 2 Cir., 255 F.2d 876; *United States v. Hiss*, S.D.N.Y., 107 F.Supp. 128, affirmed 2 Cir., 201 F.2d 372. Moreover, it seems obvious that defendant did know of his brother's condition; not only was he a psychiatrist who knew that his brother had attempted suicide, but his lawyers, in cross-examination, questioned Jack closely about his marginal sanity. That the jury chose to believe Jack notwithstanding his condition is not our affair.

[9] We see no merit in appellant's claim of error based on the prosecution's failure to disclose the whereabouts of Hans Hirschfeld, who was mentioned in Mrs. Beker's testimony. No principle of which we are aware requires the government to give the defense advance

who will be mentioned in the testimony of a witness for the prosecution. After Mrs. Beker testified, F. B. I. reports were made available which placed Hirschfeld in West Berlin and showed that he denied ever having known Mrs. Beker. This information was received close to the end of the trial, but defense counsel made no request for a continuance of the trial so that they might locate Hirschfeld and use him as a witness to impeach Mrs. Beker's credibility. And we note that Hirschfeld, as a prominent aide to the West Berlin government, could have been located with a minimum of time and effort.

[10] The second mass of evidence brought forth on motions for a new trial was testimony of persons working in O. S. S. with Hirschfeld, relating to the question of whether Hirschfeld had access to "national defense information." But, as Judge Herlands properly ruled, this evidence was not "newly-discovered." These witnesses were as available during trial as after it; their late appearance was dictated only by the trial strategy of defense counsel, who produced no witnesses or exhibits of their own, but only cross-examined those of the prosecution. And as to the function of Hirschfeld's office in the O. S. S., they did not even cross-examine Doering, the O. S. S. general counsel, at trial.

Further, the new testimony sought to be introduced was merely cumulative and impeaching and such evidence "ordinarily will not support a motion for a new trial," *Mesarosh v. United States*, 352 U.S. 1, 9, 77 S.Ct. 1, 1 L.Ed.2d 1; see *United States v. Rutkin*, 3 Cir., 208 F.2d 647, 654. And even if the testimony of these new witnesses had been received and believed (thus contradicting the witness Beker), a different result could not be anticipated. Under *United States v. Gorin*, supra, defendant could be guilty even if the work of the biographical records section was as limited as they testified it was; and under the loose and shifting standards of conspiracy, Soblen could have been found guilty of conspir-

succeeded. See *United States v. Abel*, 2 Cir., 258 F.2d 485, affirmed, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668. A new trial was properly denied.

For the foregoing reasons both appeals must fail.

We confess that the sentence of life imprisonment seems to us somewhat harsh but the sentence is a matter with which we may not concern ourselves since it does not exceed what the statute authorizes. Nor has the appellant argued that the sentence does concern us.

Accordingly the judgment of conviction and the denial of the motion for a new trial are both affirmed.



UNITED STATES of America,
Plaintiff-Appellee,

v.

Skander NASSER, Jr., Defendant-
Appellant.
No. 13491.

United States Court of Appeals
Seventh Circuit.
March 23, 1962.

Rehearing Denied April 13, 1962.
Certiorari Denied June 18, 1962.
See 82 S.Ct. 1559.

Prosecution for causing applicant for loan, which, it was intended, would be offered to Federal Housing Administration for insurance, to make a false statement. From a judgment of the United States District Court for the Southern District of Indiana, William E. Steckler, Chief Judge, the defendant appealed. The Court of Appeals, Hastings, Chief Judge, held that leniency of trial court in not imposing prison sentence and remarks of court exhibiting an understanding of defendant's personal feelings did not indicate a reasonable doubt

in the mind of the court sitting without a jury.

Affirmed.

1. Fraud ⚡69

Charge that defendant "did unlawfully, knowingly, and wilfully cause" named individual "to make a false statement" was sufficient to properly charge defendant as a principal in crime of making a false statement in obtaining a loan which was to be insured by Federal Housing Administration. 18 U.S.C.A. §§ 2, 1010.

2. Fraud ⚡69

Indictment charging defendant with having caused loan applicant to falsely declare that he intended loan to be used for siding, electric pump, room on house, and bathroom, when defendant knew that applicant did not intend to use loan proceeds for such purposes "solely", set out a violation of statute prohibiting making of false statements. 18 U.S.C.A. § 1010; Fed.Rules Crim.Proc. rule 7, 18 U.S.C.A.; U.S.C.A.Const. Amend. 5.

3. Criminal Law ⚡627½

Motion for disclosure to defendant of record and transcript of evidence presented to grand jury upon which indictment was founded, based upon a showing that defendant did not know what had transpired at grand jury proceedings, but with no showing of irregularity or particularized need to establish a compelling necessity, was properly denied. Fed.Rules Crim.Proc. rule 6(e), 18 U.S.C.A.

4. Fraud ⚡69

Oral testimony concerning contract between home owner and defendant charged with causing loan applicant to make a false statement relative to a loan to be offered to Federal Housing Administration for insurance, and concerning exhibit relating to credit application and contract was germane to issue of intent and properly admitted. 18 U.S.C.A. § 1010.

5. Criminal Law ⚡561(1)

Leniency of court in not imposing prison sentence should not be taken to

VON MOLTKE *v.* GILLIES, SUPERINTENDENT OF
THE DETROIT HOUSE OF CORRECTION.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
SIXTH CIRCUIT.

No. 73. Argued November 20, 1947.—Decided January 19, 1948.

Upon an indictment for conspiracy to violate the Espionage Act of 1917, the penalty for which may be death or imprisonment for as long as 30 years, petitioner signed a paper purporting to waive her right to counsel and pleaded guilty. She was sentenced to imprisonment for four years. In a subsequent habeas corpus proceeding challenging the validity of the sentence, she alleged (1) that the plea was entered because of coercion, intimidation, and deception by federal officers in violation of the due process clause of the Fifth Amendment, and (2) that she neither understandingly waived the benefit of the advice of counsel nor was provided with the assistance of counsel as required by the Sixth Amendment. The District Court heard the conflicting evidence offered by petitioner and the Government, found that petitioner had failed to prove either contention, and dismissed the writ. The Circuit Court of Appeals affirmed. *Held:*

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is set aside. The cause is remanded to the District Court so that it may hold further hearings and give consideration to, and make explicit findings upon, the question whether the petitioner pleaded guilty in reliance upon the erroneous legal advice of a Government agent. If upon such further hearings and consideration the District Court finds that the petitioner did not competently, intelligently, and with full understanding of the implications waive her constitutional right to counsel, an order should be entered directing that she be released from further custody under the judgment based on her plea. Pp. 709-710, 727. 161 F. 2d 113, reversed.

In a habeas corpus proceeding in which the petitioner sought release from imprisonment under a sentence upon her plea of guilty to an indictment for conspiracy to violate the Espionage Act of 1917, the District Court dis-

missed the writ. The Circuit Court of Appeals affirmed. 161 F. 2d 113. This Court granted certiorari. 331 U. S. 800. *Reversed and remanded*, p. 727.

G. Leslie Field argued the cause and filed a brief for petitioner.

Frederick Bernays Wiener argued the cause for respondent. With him on the brief were *Solicitor General Perlman*, *Robert S. Erdahl* and *Philip R. Monahan*.

MR. JUSTICE BLACK announced the judgment of the Court and an opinion in which MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE concur.

The petitioner was indicted for conspiracy to violate the Espionage Act of 1917.¹ The specific charge was that, in order to injure the United States and to aid the German Reich, she and twenty-three others had conspired during the second World War to collect and deliver vital military information to German agents.

With no money to hire a lawyer and without the benefit of counsel the petitioner appeared before a federal district judge, told him that the indictment had been explained to her, signed a paper stating that she waived the "right to be represented by counsel at the trial of this cause," and then pleaded guilty. Under her plea she could have been sentenced to death or to imprisonment for not more than thirty years. After thirteen months in jail following her plea, the court sentenced her to four years in prison.

In this habeas corpus proceeding she charged that the sentence, resting as it did solely on her plea of guilty,

¹ Section 32 defines the substantive crime of espionage. Section 34 declares conspiracies to violate § 32 to be unlawful. 40 Stat. 217, 50 U. S. C. §§ 32, 34.

was invalid for two reasons: First, she alleged that the plea was entered by reason of the coercion, intimidation, and deception of federal officers in violation of the due process clause of the Fifth Amendment. Second, she alleged that she neither understandingly waived the benefit of the advice of counsel nor was provided with the assistance of counsel as required by the Sixth Amendment. As the Government concedes, these charges entitle the petitioner to have the issues heard and determined in a habeas corpus proceeding, and, if true, invalidate the plea and sentence.² The District Court heard evidence offered by both the petitioner and the Government, and then found that she had failed to prove either contention. 72 F. Supp. 994. The Sixth Circuit Court of Appeals affirmed, with one judge dissenting. 161 F. 2d 113.

On the basis of what he designated as "the undisputed evidence," the dissenting judge concluded that petitioner had pleaded guilty because of her reliance upon the legal advice of a Federal Bureau of Investigation (FBI) lawyer-agent, which advice "was, though honestly given, false." Neither the District Court nor the majority of the Circuit Court of Appeals controverted this conclusion of the dissenting judge. A challenge to a plea of guilty made by an indigent defendant, for whom no lawyer has been provided, on the ground that the plea was entered in reliance upon advice given by a government lawyer-agent, raises serious constitutional questions. Under these circumstances we granted certiorari in this case. 331 U. S. 800.

It thus becomes apparent that determination of the questions presented depends upon what the evidence showed. There was conflicting testimony on many points

² *Waley v. Johnston*, 316 U. S. 101; *Walker v. Johnston*, 312 U. S. 275, 286; *Johnson v. Zerbst*, 304 U. S. 458, 467; cf. *Sunal v. Large*, 332 U. S. 174, 177.

in this case. We do not attempt to resolve these conflicts. Our conclusion is reached from the following facts shown by the testimony of government agents or by undisputed evidence offered by petitioner.

The petitioner was born in Germany. In that country she bore the title of countess. She and her husband came to the United States in December, 1926. Since 1930 they have lived in Detroit where the petitioner has been a housewife and her husband an instructor in German at Wayne University. Her husband is a naturalized citizen of the United States; her own naturalization papers have been pending for some time. They have four children, three of whom were born in this country as American citizens.

August 24, 1943, between 6 and 7 a. m., six FBI agents came to their home. The petitioner was in bed. She was informed that she must get up and go with them. The home was searched with her husband's permission. She was taken to the local office of the FBI, fingerprinted, photographed, and examined by a physician. From there she was taken to the Immigration Detention Home, placed in solitary confinement, and, with one exception noted below, not permitted to see or communicate with anyone outside for the next four days. Two FBI agents persistently but courteously examined her every day from about 10 a. m. until about 9 p. m. She knew nothing about her arrest and detention except that she was being held indefinitely on a presidential warrant "as a dangerous enemy alien." She was informed "that the FBI is an investigating agency, and not a prosecuting, and as an enemy alien I [she] was not allowed to see an attorney." During this first period of questioning, the only relaxation of petitioner's incommunicado status was a single permission to relay instructions through an FBI agent to her husband who was told how to look after their nine-year-old diabetic child. This child, for whom the mother had

specially cared since his infancy, required a strict diet and injections twice daily.

September 1, eight days after her early morning arrest, petitioner was taken before an Enemy Alien Hearing Board. She was not then informed of any specific charges against her, but she was told that she could not be "represented by a legal attorney" at the hearing. The results of this hearing were not made known to her. At its conclusion she was returned to the detention home.

September 18 the petitioner was handed the indictment against her. In our printed record this document covers a little more than fourteen pages. It charges generally, in the language of the statute, that the twenty-four defendants conspired to violate the statute. It also enumerates 47 overt acts alleged to have been performed in pursuance of the objects of the conspiracy, five of which acts specifically refer to the petitioner. Four out of the five merely allege that the petitioner "met and conferred with" one or more of the other defendants; the fifth alleges that she "introduced" someone to one of the defendants.

September 21, almost a month after her arrest, the petitioner and a co-defendant, Mrs. Leonhardt, were taken to the courthouse for arraignment. Upon being told that the two defendants had no attorney and no means to obtain one, the judge said he would appoint counsel right away and would not arraign them until they had seen an attorney. They were then led "to the bull pen to wait for the attorney." Before any attorney arrived they were taken back into the courtroom. Court was in session. As explained by petitioner and corroborated by others, "Judge Moinet was on the bench, and there seemed to be a trial going on, because Judge Moinet appointed a lawyer in the courtroom. He said, 'Come here, "so-and-so", and help these two women out,' and the young lawyer objected to that; he said he didn't want to have anything to do with

that. But then he consented just for the arraignment, to help out, and he came over to us—we were sitting on the side bench—and he asked me, 'How do you want to plead?' I said, 'Not guilty.' And he asked Mrs. Leonhardt, and she said the same thing. So he told us that, he whispered to us, in fact, he went over it, whispered that it would not be advisable, but I do not know even now why, but he suggested it would be proper to stand mute." In this two to five minute whispered conversation (the lawyer said "a couple of minutes") the lawyer asked both defendants if they "understood what this was all about." They indicated that they did. He did not even see the indictment, did not inform the petitioner as to the nature of the charge against her or as to her possible defenses, and did not inquire if she knew the punishment that could be imposed for her alleged offense. The case on trial was then interrupted, the charge was made against the defendants, who stood mute, and a plea of not guilty was entered. With reference to their future representation by an attorney, the petitioner's uncontradicted testimony was that the judge "said he would appoint an attorney right away, and I understood that the gentleman was to be expected to come right away."

The two women, unable to get out on bond, were then immediately taken from the courthouse to the Wayne County jail. The matron there informed the petitioner that she had strict orders to hold the petitioner and Mrs. Leonhardt "incommunicado." Notwithstanding this order, however, the FBI agents continued to visit and talk with both of them and a third defendant, Mrs. Behrens, every day except Sunday. During this period all three of them were allowed to read and discuss among themselves the unfavorable newspaper reports which their arrest and indictment had occasioned. They talked also with the FBI agents about this adverse publicity and about how they should plead to the charges.

September 25, one month and one day after Mrs. von Moltke's arrest, two lawyers came to the jail to see her. They had been sent by her husband. One of them appears to have taken the husband's language course at Wayne University. These lawyers' message was the first communication she had been permitted to receive from her husband since her removal to the county jail. She had been so well shut off from the outside world that she thought he did not even know where she was then confined. These lawyers informed her that, although they had come at her husband's request, they would not represent her as counsel. Furthermore, they warned her that they would not even hold what she said in confidence, and that they would feel free to disclose anything she told them to the Government. Only one of the lawyers appeared at the trial. He testified that the petitioner was concerned during their visit for her children and her husband, whom the university had removed from his \$4,000 position the day after her arrest. She particularly inquired whether it would help her husband to get his university position back if she pleaded guilty, but received no counsel on the subject one way or another. In fact, the lawyers emphasized a number of times that they could not and would not advise her what she should do. Although they gave her a form of cross-examination regarding the charges against her in the indictment, they did not attempt to explain to her the implications of these charges, or to advise her as to any possible defenses to them, or to inform her of the permissible punishments under the indictment.

September 28, three days after the lawyers' visit, the petitioner and Mrs. Leonhardt were taken by FBI agents to the marshal's office where they talked with the assistant district attorney about what plea they should enter. Mrs. Leonhardt announced there that she would plead guilty, which plea she later entered, but the petitioner first

asked for the opportunity of discussing the matter with her husband. He came to the marshal's office, was allowed to talk with his wife in the "bull pen," and advised her not to do anything before she saw a lawyer. She then declined to plead guilty and was taken back to jail.

October 7, nine days later, she did plead guilty without having talked to any lawyer in the meantime except the FBI agent-attorneys, although she had seen her husband several more times. A few days before the 7th, Mrs. Behrens had entered a plea of guilty, and rumors reached the petitioner that other defendants named in the indictment would also plead guilty. During the interval between the 28th of September and petitioner's plea of guilty on the 7th of October, the FBI men had talked to her daily. She had particularly asked them whether under United States law she would have the right to a trial if all her co-defendants pleaded guilty. The agent's reply, as he remembered it, was "that the question of the trial would be up to the United States Attorney's Office." She also repeatedly plied the agents with questions as to what plea she should enter in order to reduce as much as possible the injurious publicity of the affair, and what would be the least harmful course to make it possible for her husband to recover his old position. She was also vitally interested in whether she would be deported, and whether, if she did plead guilty, her sentence could be served close to her family. All of these subjects the agents talked over with her in their daily conversations and one of them offered to, and did, discuss them with the assistant district attorney on her behalf. Following this discussion, the agent brought back word to the petitioner that the assistant district attorney could not control deportation, publicity, or the place of her imprisonment, but that if she pleaded guilty he would write a letter to the controlling authorities and recommend that she be imprisoned close to her family.

About this time one of the lawyer-agents of the FBI discussed the petitioner's legal problems with her at great length. According to his testimony he did his best to explain the implications of the indictment. She told this agent-attorney about a statement she had heard while in jail that unless she pleaded guilty her husband would be involved, and she asked the agent if this were true. He replied that he could not answer this question. She also asked one of the lawyer-agents whether mere association with people guilty of a crime—such association as that with which she was charged in the five overt acts—was sufficient in itself to bring about her conviction under the indictment. This agent, according to the petitioner, then explained the indictment to her by the use of a "Rum Runners" plot as an example. She testified that he said: "That if there is a group of people in a 'Rum' plan who violate the law, and another person is there and the person doesn't know the people who are planning the violation and doesn't know what is going on, but still it seemed after two years this plan is carried out, in the law the man who was present becomes . . . the person nevertheless is guilty of conspiracy. . . ." The FBI agent did not deny that he had given her the rum runner illustration. In fact, the agent said that it was quite possible that the conversation had occurred.³

During the ten days prior to her plea of guilty, petitioner had many conversations with FBI agents about how she should plead to the indictment. In resolving her doubts she had no legal counsel upon whom to rely

³"Q. And did you during that discussion use a [*sic*] illustration about a rum runner?"

"A. Well, I heard Mrs. von Moltke say that, and since she did I have been trying to recall, and I cannot remember such an illustration.

"Q. I see.

"A. But it is quite possible that Mrs. von Moltke's memory is better than mine, and I may have used such an illustration."

except the government lawyer-agents, since neither she nor her husband could afford a lawyer, and the counsel promised by Judge Moinet never appeared. Her chief concern in trying to decide whether to plead guilty was not the indictment, or possible imprisonment; as was testified by government agents, "She was concerned about her husband and his job," and "she was hoping to do whatever would be best for her husband and her child." That her troubled state of mind was recognized by the prosecuting attorney is shown by these leading questions he asked her on cross-examination:

"Q. Now, isn't it true that up until the time you plead guilty you repeatedly asked the agents for advice as to whether you should plead guilty or not? Isn't that true?"

"A. There was nobody else I could ask.

"Q. Well, just say yes or no.

"A. Yes."

October 7, having reached a temporary decision, she went with two of the agents to the assistant district attorney and told him that she wanted to plead guilty. Since Judge Moinet was not available, she was taken before another judge who was unfamiliar with the case. At first he would not accept the plea of guilty because she then had no lawyer, and the record before him indicated that she had previously pleaded not guilty under the advice of counsel. But in response to the judge's questions, she said that she understood the indictment and was voluntarily entering a plea of guilty. The judge then permitted petitioner to sign a written waiver of counsel. The whole matter appears to have been disposed of by routine questioning within five minutes during an interlude in another trial. If any explanation of the implications of the indictment or of the consequences of her plea was then mentioned by the judge, or by anyone in his presence, the record does not show it. Nor is there

upon the trial court's refusal to permit the withdrawal of her plea was obvious, in view of her failure to meet the strict requirements of Rule II (4). It seems pretty plain that the petitioner has raised the question here in the only proper way—by habeas corpus proceedings.

We accept the government's contention that the petitioner is an intelligent, mentally acute woman. It is not now necessary to determine whether, as the Government argues, the District Court might reasonably have rejected much of petitioner's testimony. Nor need we pass upon the government's contention that the evidence might have supported a finding that the FBI lawyer-agent did not actually give her the erroneous advice that mere association with criminal conspirators was sufficient in and of itself to make a person guilty of criminal conspiracy. For, assuming the correctness of the two latter contentions, we are of the opinion that the undisputed testimony previously summarized shows that when petitioner pleaded guilty, she did not have that full understanding and comprehension of her legal rights indispensable to a valid waiver of the assistance of counsel.

First. The Sixth Amendment guarantees that an accused, unable to hire a lawyer, shall be provided with the assistance of counsel for his defense in all criminal prosecutions in the federal courts. *Walker v. Johnston*, 312 U. S. 275, 286; see *Foster v. Illinois*, 332 U. S. 134, 136-137. This Court has been particularly solicitous to see that this right was carefully preserved where the accused was ignorant and uneducated, was kept under close surveillance, and was the object of widespread public hostility. *Powell v. Alabama*, 287 U. S. 45. The petitioner's case bristled with factors that made it all the more essential that, before accepting a waiver of her constitutional right to counsel, the court be satisfied that she fully comprehended her perilous position. We were waging total war with Germany. She had a Ger-

man name. She was a German. She had been a German countess. The war atmosphere was saturated at that time with a suspicion and fear of Germans. The indictment charged that while this country was at war with Germany and Japan the petitioner had conspired with others to betray our military secrets to Germany. She had been kept in close confinement since her arrest. Many of her alleged co-conspirators had already pleaded guilty. If found guilty, she could have been, and many people might think should have been, legally put to death as punishment for violation of the Espionage Act. If not executed, she could have been imprisoned for thirty years or for such shorter period as the judge in his discretion might fix. Even when the trial court was about to impose sentence on this petitioner following her plea of guilty, a lawyer might have rendered her invaluable aid in calling to the court's attention any mitigating circumstances that might have inclined him to fix a lighter penalty for her. Anyone charged with espionage in wartime under the statute in question would have sorely needed a lawyer; Mrs. von Moltke, in particular, desperately needed the best she could get.

Second. A waiver of the constitutional right to the assistance of counsel is of no less moment to an accused who must decide whether to plead guilty than to an accused who stands trial. See *Williams v. Kaiser*, 323 U. S. 471, 475. Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered. Determining whether an accused is guilty or innocent of the charges in a complex legal indictment is seldom a simple and easy task for a layman, even though acutely intelligent. Conspiracy charges frequently are of broad and confusing scope, and that is particularly true of conspiracies under the Espionage Act. See, *e. g.*, *Gorin v.*

United States, 312 U. S. 19; *United States v. Heine*, 151 F. 2d 813. And especially misleading to a layman are the overt act allegations of a conspiracy. Such charges are often, as in this indictment, mere statements of past associations or conferences with other persons, which activities apparently are entirely harmless standing alone. A layman reading the overt act charges of this indictment might reasonably think that one could be convicted under the indictment simply because he had, in perfect innocence, associated with some criminal at the time and place alleged. The undisputed evidence in this case that petitioner was concerned about many of these legal questions—such as the significance of the overt act charges, and her possibilities of defense should all her co-defendants plead guilty—emphasizes her need for the aid of counsel at this stage.

Third. It is the solemn duty of a federal judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right at every stage of the proceedings. *Johnson v. Zerbst*, 304 U. S. 458, 463; *Hawk v. Olson*, 326 U. S. 271, 278. This duty cannot be discharged as though it were a mere procedural formality. In *Powell v. Alabama*, 287 U. S. 45, the trial court, instead of appointing counsel particularly charged with the specific duty of representing the defendants, appointed the entire local bar. This Court treated such a cavalier designation of counsel as a mere gesture, and declined to recognize it as a compliance with the constitutional mandate relied on in that case. It is in this light that we view the appointment of counsel for petitioner when she was arraigned. This lawyer, apparently reluctant to accept the case at all, agreed to represent her only when promised by the judge that it would take only two or three minutes to perform his duty. And it seems to have taken no longer. Even

though we assume that this attorney did the very best he could under the circumstances, we cannot accept this designation of counsel by the trial court as anything more than token obedience to his constitutionally required duty to appoint counsel for petitioner. Arraignment is too important a step in a criminal proceeding to give such wholly inadequate representation to one charged with a crime. The hollow compliance with the mandate of the Constitution at a stage so important as arraignment might be enough in itself to convince one like petitioner, who previously had never set foot in an American courtroom, that a waiver of this right to counsel was no great loss—just another legalistic formality. We are unable to agree with the government's argument that the momentary appointment of the lawyer for arraignment purposes supports the contention that the petitioner intelligently waived her right to counsel. In fact, that court episode points in the other direction, for the judge then told the petitioner that he would appoint another lawyer "right away" for her—which he never did until long after she had pleaded guilty, too late to do her any good.

Fourth. We have said: "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused."⁶ To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel,⁷ a judge must investigate as long and as thoroughly as the circumstances of the case before

⁶ *Johnson v. Zerbst*, 304 U. S. 458, 465; see also *Adams v. United States ex rel. McCann*, 317 U. S. 269, 270.

⁷ *Johnson v. Zerbst*, 304 U. S. 458, 464; *Glasser v. United States*, 315 U. S. 60, 70.

can lawyer.⁹ It is this kind of service for which the Sixth Amendment makes provision. And nowhere is this service deemed more honorable than in case of appointment to represent an accused too poor to hire a lawyer, even though the accused may be a member of an unpopular or hated group, or may be charged with an offense which is peculiarly abhorrent.

The admitted circumstances here cannot support a holding that petitioner intelligently and understandingly waived her right to counsel. She was entitled to counsel other than that given her by Government agents. She is still entitled to that counsel before her life or her liberty can be taken from her.

What has been said represents the views of MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE. They would therefore reverse the judgment of the Circuit Court of Appeals, set aside the prior judgment of the District Court and direct that court to grant the petitioner's prayer for release from further imprisonment under the judgment based on her plea of guilty. MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON, for the reasons stated in a separate opinion, agree that the judgment of the Circuit Court of Appeals

⁹ American Bar Association, Canons of Professional and Judicial Ethics, Canon 15: "The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense."

Canon 4: "A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf."

should be reversed, and that the District Court's prior judgment should be set aside, but they are of the opinion that, after setting aside its judgment, the District Court should further consider, and make explicit findings on, the questions of fact discussed in the separate opinion.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is set aside. The cause is remanded to the District Court so that it may hold further hearings and give consideration to, and make explicit findings on, the questions of fact discussed in the separate opinion. If upon such further hearings and consideration the District Court finds that the petitioner did not competently, intelligently, and with full understanding of the implications, waive her constitutional right to counsel, an order should be entered directing that she be released from further custody under the judgment based on her plea.

It is so ordered.

Separate opinion of MR. JUSTICE FRANKFURTER, in which MR. JUSTICE JACKSON joins.

The appropriate disposition of this case turns for me on the truth of petitioner's allegation that she was advised by an F. B. I. agent, active in the case, that one who merely associated, however innocently, with persons who were parties to a criminal conspiracy was equally guilty.

We are dealing, no doubt, with a person of intellectual acuteness. But it would be very rare, indeed, even for an extremely intelligent layman to have the understanding necessary to decide what course was best calculated to serve her interests when charged with participation in a conspiracy. The too easy abuses to which a charge of conspiracy may be put have occasioned weighty animadversion by the Conference of Senior Circuit Judges. Re-

port of the Attorney General, 1925, pp. 5-6; and see also the observations of Judge Learned Hand in *United States v. Falcone*, 109 F. 2d 579, 581; affirmed in 311 U. S. 205. The subtleties of refined distinctions to which a charge of conspiracy may give rise are reflected in this Court's decisions. See, e. g., *Kotteakos v. United States*, 328 U. S. 750. Because of its complexity, the law of criminal conspiracy, as it has unfolded, is more difficult of comprehension by the laity than that which defines other types of crimes. Thus, as may have been true of petitioner, an accused might be found in the net of a conspiracy by reason of the relation of her acts to acts of others, the significance of which she may not have appreciated, and which may result from the application of criteria more delicate than those which determine guilt as to the usual substantive offenses. Accordingly, if an F. B. I. agent, acting as a member of the prosecution, gave her, however honestly, clearly erroneous legal advice¹ which might well have induced her to believe that she was guilty under the law as expounded to her by one who for her represented the Government, a person in the petitioner's situation might well have thought a defense futile and the mercy of the court her best hope. Such might have been her conclusion, however innocent she may have deemed herself to be. I could not regard a plea of guilty made under such circumstances, made without either the advice of counsel exclusively representing her or after a searching inquiry by the court into the under-

¹This is the precise testimony: "That if there is a group of people in a 'Rum' plan who violate the law, and another person is there and the person doesn't know the people who are planning the violation and doesn't know what is going on, but still it seemed after two years this plan is carried out, in the law the man who was present becomes . . . the person nevertheless is guilty of conspiracy." The law, of course, is precisely to the contrary. *United States v. Falcone*, 311 U. S. 205, 210.

standing that lay behind it, as having been made on the necessary basis of informed, self-determined choice.

Of course an accused "in the exercise of a free and intelligent choice, and with the considered approval of the court . . . may . . . competently and intelligently waive" his right to the assistance of counsel guaranteed by the Sixth Amendment. *Adams v. United States ex rel. McCann*, 317 U. S. 269, 275; and see *Patton v. United States*, 281 U. S. 276, and *Johnson v. Zerbst*, 304 U. S. 458. There must be both the capacity to make an understanding choice and an absence of subverting factors so that the choice is clearly free and responsible. If the choice is beclouded, whether by duress or by misleading advice, however honestly offered by a member of the prosecution, a plea of guilty accepted without more than what this record discloses can hardly be called a refusal to put the inner feeling of innocence to the fair test of the law with intelligent awareness of consequences. Therefore, if the F. B. I. agent had admitted that the petitioner accurately stated his advice to her, or if the District Court upon a conflict of testimony had found that memory or truth lay with the petitioner, I could not escape the conclusion that the circumstances under which the petitioner's plea of guilty was accepted did not measure up to the safeguards heretofore enunciated by this Court for accepting a plea of guilty, especially where a sentence of death was at hazard.

On the record as we have it, however, I cannot tell whether the advice which, if given, would have colored the plea of guilty was actually given. If the unrevealing words of the cold record spoke to me with the clarity which they convey to four of my brethren, I should agree that the petitioner must be discharged. Conversely, if the District Court's opinion conveyed to me the findings which it radiates to my other brethren, I too would conclude that the judgment should be affirmed.

Unfortunately, the record does not give me a firm basis for judgment regarding the crucial issue of the F. B. I. agent's advice to the petitioner. It is not disputed that the agent, who was also a lawyer, did talk with her and did discuss legal issues with her. But he neither admitted nor denied whether, in the course of his discussions with her, he expounded the law so as hardly to leave her escape, however innocent under a correct view of the law she may have been. He did not even suggest that even though he did not remember, he was confident that he could not have given her the kind of misleading legal information she attributed to him. On the contrary, he added that "it is quite possible that Mrs. von Moltke's memory is better than mine."² From the dead page, in connection with the rest of the agent's testimony, this suggests a scrupulous witness. But I cannot now recreate his tone of voice or the gloss that personality puts upon speech. Therefore I am unable to determine whether the petitioner pleaded guilty in reliance on the palpably erroneous advice of an F. B. I. lawyer-agent who, as the symbol of the prosecution, owed it to an accused in petitioner's position to give her accurate guidance, if he gave any.

Nor does the District Judge's opinion resolve these difficulties for me. From what he wrote it would be the most tenuous guessing whether he rejected the petitioner's account of the F. B. I. agent's counselling or whether he did not attach to that issue the legal significance which

² "Q. And did you [the F. B. I. agent] during that discussion use a [sic] illustration about a rum runner?"

"A. Well, I heard Mrs. von Moltke say that, and since she did I have been trying to recall, and I cannot remember such an illustration.

"Q. I see.

"A. But it is quite possible that Mrs. von Moltke's memory is better than mine, and I may have used such an illustration."

I deem controlling.³ Since the record affords neither resolving evidence nor the District Court's finding on what I deem to be the circumstance of controlling importance, I would send the cause back to the District Court for further proceedings with a view to a specific finding of fact regarding the conversation between petitioner and the F. B. I. agent, with as close a recreation of the incident as is now possible.

MR. JUSTICE BURTON, with whom THE CHIEF JUSTICE and MR. JUSTICE REED concur, dissenting.

As the issues in this case are factual and deal largely with the credibility of witnesses, the binding force of this decision as a precedent is narrow. However, to guard against undue extension of its influence, a recorded dissent seems justified.

The Government does not contest the release of the petitioner if she establishes, as a matter of fact, that either her long considered and unequivocal plea of guilty

³ The District Judge indicated abandonment of the charges that the "agents of the Federal Bureau of Investigation mislead [sic] her or made promises to her that, which at least [in] some degree, influenced her action in pleading guilty to the charge," but "for the purpose of the record" he stated "most vigorously that there was absolutely nothing in the testimony sustaining such charges or implications." While it does appear, from the record, that petitioner abandoned her charge of coercion, there is nothing to buttress the suggestion that she abandoned the charge that she had been misled by the agent, and I therefore read the statement as referring to threats or promises to induce confession by the petitioner. The District Judge gave no intimation whatever that in his view the plea of guilty in connection with all the other circumstances could not be deemed to have been intelligently tendered, if in fact it was influenced by the F. B. I. agent's exposition of the law, as asserted by the petitioner. Nowhere is there a suggestion that although the agent was not prepared to say her memory of the interview was false or incorrect, the District Judge rejected her account.